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Recommended Citation
Jay Strozdas, *Trendlines: Court Decisions, Proposed Legislation, and Their Likely Impact on Binational Same-Sex Families* , 44 Loy. L.A. L. Rev. 1339 (2011).
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TRENDLINES: COURT DECISIONS, PROPOSED LEGISLATION, AND THEIR LIKELY IMPACT ON BINATIONAL SAME-SEX FAMILIES

*Jay Strozdas**

Family is a cornerstone of U.S. immigration policy. The United States grants green cards to every immigrant who is validly married to a U.S. citizen—unless the marriage is to someone of the same sex. The Defense of Marriage Act (DOMA) denies federal recognition of so-called same-sex marriages. Recent social, political, judicial, and legislative trends suggest the eventual abrogation of DOMA. Even so, sponsorship for same-sex couples is not automatic and will ultimately depend on how DOMA's demise is achieved. This Article illuminates a clear path for same-sex binational couples to receive equal immigration benefits in a post-DOMA world. However, if DOMA remains law, same-sex binational couples must turn toward comprehensive immigration reform. The Uniting American Families Act is a proposed piece of legislation that provides a sponsorship route that is unaffected by DOMA, but its requirements may prove difficult for same-sex binational families to satisfy. Thus, for the more than 36,000 same-sex binational couples who face decisions like separation or exile, an end of DOMA is the preferred—but not exclusive—solution for granting sponsorship rights to all families.

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TABLE OF CONTENTS

I. INTRODUCTION 1342
II. IMMIGRATION INEQUALITY FOR SAME-SEX FAMILIES 1345
A. Family-Based Immigration 1345
B. Immigration Inequality: Past and Present 1348
C. Recent Developments in Gay and Lesbian Rights 1351
III. ENDING DOMA AND ITS IMPLICATIONS FOR IMMIGRATION 1353
A. Legislative Repeal of DOMA: Far-Reaching but Unlikely 1354
B. Federal Court Finds DOMA Unconstitutional 1355
1. Two Different Constitutional Theories Lead to Same Result 1356
2. Promising Precedent, but Narrow 1357
C. Precedent on Appeal 1358
1. Federalism Argument Unlikely to Succeed 1359
2. Equal Protection Precedent Could Shape Future DOMA Challenges 1360
D. *Perry* and New DOJ Stance Bolster *Gill* Holding 1361
IV. *PERRY* AND ITS IMPLICATIONS FOR IMMIGRATION 1364
A. *Perry*: History, Holding, and Appeal 1364
B. Reversal Would Be a Setback 1366
C. Fundamental Right to Marry Will Bring an End to DOMA 1367
D. Many Equal Protection Arguments: Most Lead to End of DOMA 1368
1. Suspect Classification: Broad, but Unlikely to Be Considered 1368
2. Gender-Based Discrimination 1369
3. Rational Basis Can Be Used to Strike Down Proposition 8 and DOMA 1371
V. IMMIGRATION ISSUES POST-DOMA 1374
A. Defining Marriage for Immigration 1375
1. Creating a New Definition for Marriage Is Unlikely 1375
2. Plenary Power Is Not an Obstacle 1375
3. Applying the INA Three-Step Test Allows for Recognition of Marriage for Same-Sex Couples 1378

4. Precedent Restricting Recognition Is No Longer Valid 1381
B. State Marriage Recognition Post-DOMA 1382
VI. UAFA AND ITS IMPLICATIONS FOR IMMIGRATION 1384
A. History of the Bill 1384
B. Text of the UAFA 1386
C. Marriage Cognizable Under the Act: Interpreting for Consistency 1387
1. Asymmetrical Rights Are Created 1387
2. When Is a Couple Unable to Contract Marriage? 1389
3. Remove the Requirement in Order to Broaden the Bill 1389
D. Financial Interdependence: Problems and Solutions 1390
1. Defining Financial Interdependence 1391
2. Achieving Interdependence Is Inherently Difficult for Binational Couples 1392
3. Added Requirement Creates Asymmetrical Rights 1393
4. Solution: Extending Fiancé Visas 1394
5. Solution: Remove the Requirement 1395
VII. CONCLUSION 1396

> *We are separated, and without each other. . . . We just want to be together, that's all. No harm in that.*[1]

I. INTRODUCTION

Family is a cornerstone of U.S. immigration policy. In 2009, more than two-thirds of all green cards were obtained through family-based immigration.[2] However, many families—those of gays and lesbians[3]—are excluded from that count. Gays and lesbians are ineligible to sponsor their foreign spouses or partners for family-based immigration, even if they are legally married.[4] This leaves approximately thirty-six thousand same-sex binational couples living in the United States[5] in a state of immigration limbo.

At first, many same-sex couples are able to stay together through nonimmigrant visas for tourists or students. But when the nonimmigrant visas expire, the options remaining are bleak: violate

1. HUMAN RIGHTS WATCH & IMMIGRATION EQUAL., FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 9 (2006) [hereinafter FAMILY UNVALUED] (quoting E-mail from Sandra (last name withheld at her request) to Immigration Equal. (Oct. 29, 2005)), *available at* http://www.hrc.org/documents/FamilyUnvalued.pdf.

2. OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 18 tbl.6 (2009) [hereinafter IMMIGRATION YEARBOOK], *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf (reporting that 747,413 persons obtained legal permanent residence as immediate relatives or through family-sponsored preference categories out of the 1,130,818 total obtained in 2009). The number of family members receiving green cards may be higher than statistics indicate because spouses and children often immigrate as "derivatives" through a primary alien's employment-based visa. *See* Immigration and Nationality Act (INA) § 201(f)(4), 8 U.S.C. § 1151(f)(4) (2006). Derivative family members are counted against the employment-based immigration quota. *See id.*; *infra* Part II.A.

3. This Article uses the term "gay and lesbian" to refer to people who identify as gay, lesbian, bisexual, transgender, or queer. The term is used for simplicity and does not imply that other identities are not similarly discriminated against.

4. This is because the Defense of Marriage Act—which prevents federal recognition of marriages between same-sex couples, whether the marriage is performed in the United States or abroad—controls the INA. *See* Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. CIV. RTS. L.J. 455, 458–60 (2008) (discussing DOMA's effect on immigration law and the INA).

5. GARY J. GATES, BI-NATIONAL SAME-SEX UNMARRIED PARTNERS IN CENSUS 2000: A DEMOGRAPHIC PORTRAIT 1 (2005), *available at* http://www.law.ucla.edu/Williamsinstitute/publications/Binational_Report.pdf (reporting 35,820 same-sex binational couples based on the 2000 Census). Many believe that the 2000 census undercounted same-sex binational couples by 10 to 50 percent. *See* Teresa Watanabe, *Line in Sand for Same-Sex Couples: Unlike a Heterosexual Spouse, a Gay U.S. Citizen Cannot Sponsor His or Her Noncitizen Partner for a Green Card*, L.A. TIMES, July 16, 2007, at B1.

the law, separate, or live in exile.[6] John Beddingfield and Erwin de Leon are one family facing this decision.[7] After twelve years together, they were recently legally married in Washington, D.C.[8] However, when de Leon's student visa expires, he will be forced to become one of the millions of unauthorized immigrants[9] in the United States.[10] Another option is exile. J.W. Lown, once the mayor of a town in West Texas, was forced to move to Mexico to remain together with a Mexican citizen with whom he fell in love, thus abandoning a home, a ranch, and a promising political career.[11] As he put it, "It wasn't a decision that any U.S. citizen should have to make."[12]

Many of these decisions affect not just the citizen and his or her partner, but children as well. Nearly half of the binational same-sex couples in the United States have children.[13] Sandra from North Carolina was raising children with her Hungarian partner but now lives alone in the United States after her partner and children were forced to leave.[14] Other children may remain in the United States while one of their parents is forced to leave. Shirley Tan, an asylum seeker, is raising two twelve-year-old boys with her lesbian partner of twenty years, Jay Mercado.[15] While Mercado became nationalized,

6. Employment-based visas are a possibility but are difficult to obtain as there are quotas and most people who gain lawful permanent resident (LPR) status through employment visas are already working in the United States at the time of their application. INA § 201(d), 8 U.S.C. § 1151(d); Daniel Walfish, Note, *Student Visas and the Illogic of the Intent Requirement*, 17 GEO. IMMIGR. L.J. 473, 474 n.7 (2003).

7. Shankar Vedantam, *Gay Couples Seeking Immigration Rights*, WASH. POST, Sept. 13, 2010, at A13.

8. *Id.*

9. Following leading immigration scholars, this Article employs the phrase "unauthorized" as a more neutral term than "illegal" or "undocumented." This is not to say that the law is irrelevant, but it is the present state of the law itself that excludes people like de Leon. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1725 n.2 (2010).

10. Vedantam, *supra* note 7.

11. Michelle Roberts, *Gay Couples Forced to Flee U.S. over Immigration Law*, HOUS. CHRON. (June 10, 2009, 4:12 PM), http://www.chron.com/disp/story.mpl/nation/6469222.html.

12. *Id.*

13. GATES, *supra* note 5, at 9 (noting that approximately 46 percent of binational same-sex couples have children under age eighteen living with them in their home).

14. FAMILY UNVALUED, *supra* note 1, at 9.

15. Julia Preston, *Bill Proposes Immigration Rights for Gay Couples*, N.Y. TIMES, June 3, 2009, at A19.

Tan's asylum application was denied.[16] With no options for family sponsorship as a lesbian couple, Tan only remains in the United States temporarily.[17]

Current trends in federal court cases and targeted legislation may offer a route to permanent unification for families like Tan's.[18] Because marriage rights confer immigration rights in the United States, the current debate over so-called same-sex marriage[19] will shape family-based immigration for same-sex couples. Without a change in marriage law, Congress could craft legislation—whether standing alone or as part of comprehensive immigration reform—to expand family unification to include same-sex couples.

This Article explores three emerging developments that may lead to equal immigration benefits for same-sex binational couples: (1) federal court challenges to the Defense of Marriage Act (DOMA), the federal law that limits the definition of marriage to opposite-sex couples; (2) *Perry v. Schwarzenegger*,[20] a federal court case challenging the constitutionality of Proposition 8, California's ban on same-sex marriage; and (3) the Uniting American Families Act (UAFA), proposed legislation that would carve out a non-marriage-based sponsorship exception for same-sex binational couples. Each of these developments presents a possible solution for families like Tan's and de Leon's to avoid separation, exile, or breaking the law. However, each potential solution also presents its own obstacles for same-sex binational couples. This Article will discuss and shed light on these obstacles and present resolutions to illuminate clearer paths to immigration equality—so all families can remain together.

16. *Id.*

17. Tan has avoided deportation only because Senator Dianne Feinstein introduced a private bill on Tan's behalf. *Id.* Congress can pass a private bill creating an exception to public law for one individual or a specified group of individuals. For more information on private bills see Matthew Mantel, *Private Bills and Private Laws*, 99 LAW LIBR. J. 87 (2007).

18. For more stories of families facing separation, see STOP THE DEPORTATIONS: THE DOMA PROJECT, http://stopthedeportations.blogspot.com (last visited Apr. 9, 2011).

19. This Article avoids referring to the commonly used "same-sex marriage" phrase because that term invokes a feeling of a special right. Phrases such as "marriage between individuals of the same sex" more appropriately recognize that same-sex couples merely desire to be included in the same institution that opposite-sex couples are in.

20. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

Part II explains family unification under the Immigration and Nationality Act (INA)[21] and briefly details the historical and continuing legal inequality for gays and lesbians under the Act. Part III considers recent federal challenges to DOMA and evaluates the arguments in light of a later challenge to DOMA, as applied to immigration. Part IV focuses on the *Perry v. Schwarzenegger* litigation and its potential to yield nationwide marriage equality or at least to provide an additional route to attack DOMA. Part V explains the obstacles remaining even if DOMA is overturned and how same-sex binational couples can overcome them. Part VI discusses the UAFA and outlines the thorny interpretation and implementation issues that this legislation presents. Part VII concludes.

II. IMMIGRATION INEQUALITY FOR SAME-SEX FAMILIES

For most of the twentieth century, U.S. immigration law categorically denied entry to gays and lesbians.[22] While foreign gays and lesbians are now allowed to enter the United States,[23] they are inhibited from creating family relationships with citizens—as federal law continues to deny family-based immigration to same-sex couples.

A. Family-Based Immigration

For an alien[24] to enter the U.S. lawfully, he or she must obtain an appropriate visa. A nonimmigrant visa[25] enables an alien to

21. The INA was created in 1952 by the McCarran-Walter Bill of 1952, Pub. L. No. 82-414. Prior to the INA, immigration law was not organized in one statutory location. Though the INA stands alone as a body of law, it is also contained in section 8 of the United States Code. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGRATION SERV., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Oct. 1, 2010).

22. *See infra* notes 50–59 and accompanying text.

23. Exclusionary provisions of the INA were repealed in 1990, allowing foreign gays and lesbians to travel to the United States as freely as other noncitizens could. *See infra* note 60 and accompanying text.

24. The term "alien" is chosen over more neutral terms such as "foreign national" to stay consistent with the statutory text. Further, the term "foreign national" includes legal permanent residents in the United States since legal permanent residents are eligible to sponsor other foreign nationals for family-based immigration; the term "alien" more clearly distinguishes the two groups.

25. There is no formal definition of the term "nonimmigrant" other than to generically describe an alien in a nonimmigrant class. 2 CHARLES GORDON, STANLEY MAILMAN & STEPHEN

temporarily stay in the United States as a tourist,[26] student,[27] or temporary worker.[28] If an alien intends to stay permanently in the United States as an immigrant,[29] he or she must become a lawful permanent resident (LPR) by obtaining a permanent residence card, commonly known as a green card.[30] Typically, an alien obtains a green card through sponsorship by a U.S. citizen, an LPR, or an employer.[31] The most common route to permanent-resident status is family-based immigration,[32] which entails a U.S. citizen or LPR sponsoring a foreign family member.

An alien obtains family-based permanent residence either as an "immediate relative" of a U.S. citizen or through one of the so-called family-sponsored preference categories. Immediate relatives include only spouses, minor children, and parents.[33] The family-sponsored preference categories are as follows: (1) unmarried sons and daughters of citizens, (2) spouses and unmarried children of LPRs, (3) married sons and daughters of citizens, and (4) brothers and sisters of citizens.[34] The major difference between the immediate relative classification and the family-sponsored preference categories is that no quotas apply to aliens classified as immediate relatives.[35] The wait period for an immediate relative is only the processing time

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YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 12.03[1][a], at 12–14 to –18 (Matthew Bender ed., rev. ed. 2010).

26. A tourist visa is a "B-1" temporary visitor for pleasure visa. INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (2006).

27. A student visa is an "F-1" student visa. INA § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i).

28. A temporary worker visa is a "B-2" temporary visitor for business visa. INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B).

29. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) ("The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens . . . .").

30. *Green Card (Permanent Residence)*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=ae853ad15c673210VgnVCM100000082ca60aRCRD&vgnextchannel=ae853ad15c673210VgnVCM100000082ca60aRCRD (last updated Mar. 29, 2011).

31. *Visa Types for Immigrants*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/immigrants/types/types_1326.html (last visited Apr. 9, 2010). Although there are other ways, such as the diversity lottery or asylum. *Id.*

32. *See* IMMIGRATION YEARBOOK, *supra* note 2, at 18 tbl.6.

33. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). A parent is only considered an immediate relative if the sponsoring citizen is over age twenty-one. *Id.*

34. INA § 203(a)(1)–(4), 8 U.S.C. § 1153(a)(1)–(4).

35. INA § 201(b), 8 U.S.C. § 1151(b) (listing aliens who are not subject to direct numerical limitations).

for a visa,[36] unlike the four-year minimum[37] wait for the millions of prospective immigrants subject to preference category quotas.[38] Unsurprisingly, "immediate relatives" is the most highly favored immigration classification, receiving half of all green cards issued.[39]

Spouses compose by far the largest group within the immediate relative classification and within family-based immigration generally.[40] Yet the INA never defines the terms "spouse," "husband," or "wife."[41] Thus, the general rule is that "[t]he validity of a marriage ordinarily is judged by the law of the place where it is celebrated."[42] Married couples must follow the law in the jurisdiction where they were married and provide to immigration officials documentation proving their marriage.[43] This is true whether the marriage was performed in a foreign country or within the United States.[44] The INA even recognizes common-law marriages if they are valid where the couple lived together.[45]

36. Estimated wait times for processing depends on the embassy or consulate. For further information consult *Visa Wait Times—for Interview Appointments and Processing*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/temp/wait/wait_4638.html (last visited Mar. 27, 2011).

37. STUART ANDERSON, NAT'L FOUND. FOR AM. POLICY, FAMILY IMMIGRATION: THE LONG WAIT TO IMMIGRATE 1–2 (2010), *available at* http://carnegie.org/fileadmin/Media/Publications/NFAP_Policy_Brief_Family_Immigration.pdf.

38. *Reuniting Families Act*, CONGRESSMAN MIKE HONDA, http://honda.house.gov/index.php?option=com_content&view=article&id=90&Itemid=76 (last visited Mar. 27, 2011) ("There are currently 5.8 million people in the family immigration backlog waiting unconscionable periods of time to reunite with their family members.").

39. IMMIGRATION YEARBOOK, *supra* note 2, at 18 tbl.6 (reporting that in 2009, immediate relatives received 535,554 out of the 1,130,818 total green cards issued).

40. Nearly 30 percent of all green cards obtained in 2009 were for spouses of U.S. citizens, who made up more than half of all "immediate relatives." *Id.* Spouses of LPRs make up the largest portion of visa recipients under the family-sponsored preference categories. *Id.*

41. The closest that the INA comes is by specifying that the terms do not include so-called proxy marriages. INA § 101(a)(35), 8 U.S.C. § 1101(a)(35) (2006) ("The term 'spouse', 'wife', or 'husband' do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.").

42. 3 GORDON, MAILMAN & YALE-LOEHR, *supra* note 25, § 36.02[2][a], at 36–5.

43. U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 40.1, note N1.1(c) (2010) [hereinafter FAM: VISAS 40.1], *available at* http://www.state.gov/documents/organization/86920.pdf.

44. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY § A, at 327 (6th ed. 2008).

45. Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 562 (2010). Normally, the only narrow exceptions to the general rule of validity where performed are for proxy marriages and marriages deemed to conflict with public policy. ALEINIKOFF ET AL.,

Marriage triggers numerous benefits for aliens and their spouses. In addition to avoiding the quota system, marriage renders an alien eligible to enter the United States as a dependent of another foreign national who is a visa holder.[46] Marriage can also be used as an exception to or a waiver of deportability and inadmissibility.[47] The INA's high regard for marriage even extends to those who are unmarried but intend to marry. A K-1 visa is available for the fiancé of a U.S. citizen,[48] provided the couple met in the previous two years and is able to get married within ninety days of the fiancé's immigration.[49] None of those benefits are available to gays and lesbians. Immigration laws, in conjunction with DOMA, deny gays and lesbians the privilege of sponsoring their spouses for family-based immigration and thus perpetuate a long history of discrimination.

B. Immigration Inequality: Past and Present

Explicit discrimination against gays and lesbians for immigration purposes began with a ban against entry in the Immigration Act of 1917.[50] Congress repealed and replaced the 1917 Act with the Immigration and Nationality Act of 1952, but the exclusion of gays and lesbians continued because the INA considered gays and lesbians "afflicted with psychopathic personality . . . or a mental defect."[51] If a prospective entrant was suspected to be gay or lesbian, he or she was referred to a Public Health Service (PHS) official to diagnose the personality or defect.[52] Upon diagnosis, the person was denied entry. In 1962, the Ninth Circuit rejected inclusion of homosexuality as a "psychopathic

supra note 44, at 327. DOMA has become another large exception. *See infra* text accompanying notes 65–67.

46. *See, e.g.*, INA § 101(a)(15)(F)(ii), 8 U.S.C. § 1101(a)(15)(F)(ii) (providing nonimmigrant visa status for the spouses of student visa holders).

47. *See, e.g.*, INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (providing a waiver to inadmissibility due to unlawful presence in the United States to prevent "extreme hardship" to the U.S. citizen or lawful permanent resident spouse of the foreign national).

48. INA § 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i).

49. INA § 214(d)(1), 8 U.S.C. § 1184(d)(1).

50. Lena Ayoub & Shin-Ming Wong, *Separated and Unequal*, 32 WM. MITCHELL L. REV. 559, 563 (2006).

51. *Id.* (quoting INA, § 212(a)(4), 66 Stat. 163, 182 (1952) (codified as amended at 8 U.S.C. § 1182 (2006))).

52. *Id.* at 564.

personality" on vagueness grounds.[53] Almost immediately, Congress responded by amending the Act to exclude aliens afflicted with "'sexual deviation'—i.e., homosexuals."[54] In 1967, the U.S. Supreme Court held there was clear congressional intent "to exclude from entry all homosexuals and other sex perverts."[55]

However, in 1979 the PHS informed the Immigration and Naturalization Service (INS)[56] that it would no longer diagnose gays and lesbians as having psychopathic personalities, following the American Psychiatric Association's decision to remove homosexuality from its official list of disorders.[57] The Department of Justice (DOJ) stated that it would still continue to exclude gays and lesbians, but that it would now rely solely on the alien's voluntary admission that he or she was gay or lesbian.[58] The federal courts split on the legality of the continued exclusion of gays and lesbians.[59] Congress resolved this conflict by eliminating the exclusionary language with the passage of the Immigration Act of 1990.[60]

Although gays and lesbians are no longer categorically barred from entering the United States, they are still unable to sponsor spouses through family-based immigration. This issue first emerged in 1980, when Richard Adams and Anthony Sullivan received a marriage license in Colorado and Adams petitioned the INS to

53. Fleuti v. Rosenberg, 302 F.2d 652, 652 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449 (1963).

54. Ayoub & Wong, *supra* note 50, at 565.

55. Boutilier v. INS, 387 U.S. 118, 122 (1967).

56. The INS is a former U.S. agency charged with handling legal and illegal immigration that is now part of several agencies in the U.S. Department of Homeland Security.

57. Ayoub & Wong, *supra* note 50, at 565 (citing Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 779 (1993) and Memorandum from Julius Richmond, Assistant Sec'y for Health, U.S. Dep't of Health, Educ. & Welfare, and Surgeon Gen. to William Foege and George Lythcott (Aug. 2, 1979)).

58. *Id.*

59. *Compare* Hill v. INS, 714 F.2d 1470, 1480 (9th Cir. 1983) (ruling that homosexuals could not be excluded without certification from PHS), *with In re* Longstaff, 716 F.2d 1439, 1451 (5th Cir. 1983) (denying petitioner naturalization because he was homosexual even though no PHS certification was obtained).

60. Ayoub & Wong, *supra* note 50, at 566. In theory, gay men remain vulnerable to deportation and exclusion based upon sodomy convictions, which fall under "crime[s] involving moral turpitude." INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182 (a)(2)(A)(i)(I) (2006). However, it is unlikely that deportation or exclusion based on such grounds would be sustained after the U.S. Supreme Court struck down antisodomy statutes as unconstitutional. *See infra* text accompanying note 76.

classify Sullivan as his spouse for immigration purposes.[61] The INS denied the petition, finding that the couple "failed to establish that a bona fide marital relationship can exist between two faggots."[62] The Ninth Circuit affirmed the INS denial in *Adams v. Howerton*, finding that Congress intended the term "spouse" to refer to members of opposite-sex couples and that it was within Congress's plenary power to limit access to immigration benefits.[63]

While most of the reasoning that the *Adams* court employed is no longer tenable,[64] Congress implicitly affirmed *Adams* when it passed DOMA on September 10, 1996.[65] DOMA has two important parts: Section 3 defines the terms "marriage" and "spouse" for all federal purposes, and Section 2 affirms the states' power to refuse to recognize marriages that were performed in other states.[66] According to Section 3, "[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is husband or a wife."[67] Therefore, no same-sex marriages are recognized for federal purposes.

Since the INA is a federal law, any reference that it makes to the term spouse incorporates the DOMA definition. Specifically, DOMA supplants the general INA rule for marriage recognition—a marriage valid where celebrated is valid everywhere.[68] At the time of DOMA's passage in 1996, it did not affect any same-sex binational couples

61. Adam Francoeur, *The Enemy Within: Construction of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. C.R. & C.L. 345, 354–55 (2007). Colorado did not generally allow marriage between individuals of the same sex at the time. Adams and Sullivan were able to persuade their local county clerk to issue a marriage license in order, hopefully, to keep Sullivan in the United States. *Id.* at 354.

62. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 139 (2d ed. 1997) (quoting a letter from INS to Anthony Sullivan, Nov. 24, 1975).

63. Adams v. Howerton, 673 F.2d 1036, 1039–41 (9th Cir. 1982).

64. *See infra* text accompanying notes 243–246.

65. Francoeur, *supra* note 61, at 356.

66. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006)) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

67. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)).

68. *Infra* note 226 and accompanying text.

because no state or country performed same-sex marriages.[69] But this is no longer the case.[70] Even with a valid marriage, like the one between de Leon and Beddingfield, DOMA's modification of the INA excludes same-sex couples from immigration benefits solely based on their sex without regard to the substance of their relationships. For example, if de Leon were to have a sex change operation, the INA would likely recognize the marriage.[71] Gay and lesbian aliens may no longer be denied categorically from entering the United States, but they are still effectively barred from creating family relationships with citizens of the same sex.

C. Recent Developments in Gay and Lesbian Rights

While DOMA is still law, recent court cases and social developments demonstrate a trend toward expanding rights for gays and lesbians. In 1996, the same year that DOMA passed, the U.S. Supreme Court in *Romer v. Evans*[72] overturned a Colorado constitutional amendment designed to prevent gays and lesbians from receiving any legal protection through local and state anti-discrimination laws or even state courts. The Supreme Court found that the amendment was only explicable as "animus" toward homosexuals,[73] which is not a legitimate government justification, even under deferential rational basis review.[74] Thus, the Colorado amendment violated the equal protection rights that are guaranteed

69. In 2001, the Netherlands became the first nation to grant marriages for same-sex couples. *See Same-Sex Marriage Around the World: From Criminal Prosecutions to Legal Unions*, CBC NEWS, http://www.cbc.ca/world/story/2009/05/26/f-same-sex-timeline.html (last updated Aug. 2010) [hereinafter *Marriage Around the World*].

70. *See infra* text accompanying note 77.

71. For a discussion of the INA's recognition of a marriage involving a transsexual person, see *infra* note 234 and accompanying text.

72. 517 U.S. 620 (1996).

73. *Id.* at 632.

74. Rational basis review is the minimum level of scrutiny. The standard is very deferential and the law will be upheld if it is rationally related to a legitimate government purpose. The burden of proof is on the challenger. A less deferential basis of review is intermediate scrutiny, which is applied in gender discrimination claims. The law will be upheld under this standard if it is substantially related to an important government purpose. The burden of proof rests on the state. The most demanding level of scrutiny is strict scrutiny. This is applied in race discrimination claims. The government has the burden of proof, and the law will only be upheld if the government shows that the law is necessary to achieve a compelling purpose. This standard is usually fatal to the challenged law. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 719–20 (3d ed. 2009).

under the Fourteenth Amendment.[75] Then in 2003, the Court in *Lawrence v. Texas*[76] found that criminalizing private, consensual homosexual sodomy violated the substantive component of the Fourteenth Amendment's Due Process Clause.

Since DOMA passed, many states and countries have also shifted toward allowing gays and lesbians to marry. As this Article goes to press, there are seven jurisdictions in the United States and ten nations that perform marriages between individuals of the same sex.[77] Eleven more U.S. states allow some form of civil union or domestic partnership.[78] Public opinion has also shifted dramatically since the passage of DOMA. The percentage of Americans opposed to so-called same-sex marriage dropped from 68 percent in 1996[79] to roughly 48 percent in 2010.[80] Some 2011 polls even show that a slim majority of Americans now support marriage for same-sex couples.[81] These numbers demonstrate that Americans increasingly accept—or at least support the equal treatment of—same-sex families. As President Obama stated, "it's pretty clear where the trendlines are going."[82] Recognizing this, in February 2011, the President instructed

75. *Romer*, 517 U.S. at 635.

76. 539 U.S. 558 (2003).

77. The seven jurisdictions are Massachusetts, Connecticut, Iowa, New Hampshire, New York, Vermont, and the District of Columbia. *See Same Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=16430 (last updated July 14, 2011) [hereinafter *Same Sex Marriage*]. Maryland may become the seventh state and eighth jurisdiction. Legislation expanding marriage to same-sex couples passed the Maryland Senate but stalled in the House of Delegates. Annie Linskey and Julie Bykowicz, *What Future for Same-Sex Marriage?*, BALT. SUN, Mar. 13, 2011, at Local 1A. The ten nations are Argentina, Belgium, Canada, Iceland, Netherlands, Norway, Portugal, South Africa, Spain, and Sweden. *Marriage Around the World*, *supra* note 69.

78. California, Delaware, Hawaii, Illinois, Maine, New Jersey, Nevada, Oregon, Rhode Island, Washington, and Wisconsin. *Same Sex Marriage*, *supra* note 77.

79. Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP (May 24, 2010), http://www.gallup.com/poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx.

80. *Gay Marriage Gains More Acceptance*, PEW RESEARCH CTR. PUBL'NS (Oct. 6, 2010), http://pewresearch.org/pubs/1755/poll-gay-marriage-gains-acceptance-gays-in-the-military.

81. Sandhya Somashekhar & Peyton Craighill, *Poll: Slim Majority Backs Gay Marriage*, WASH. POST, Mar. 19, 2011, at A2 (citing a Post-ABC poll that found that 53 percent of Americans say so-called gay marriage should be legal). For the first time, a Gallup poll found that the majority of Americans (53 percent) believe marriages between same-sex individuals should be legally recognized. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx.

82. Joe Sudbay, *Transcript of Q and A with the President About DADT and Same-sex Marriage*, AMERICABLOG (Oct. 27, 2010, 7:37 PM), http://www.americablog.com/2010/10/

the Attorney General to stop defending DOMA in a few federal challenges.[83]

However, Obama made it clear that DOMA will continue to be enforced because it is still law—until Congress or a court acts.[84] Accordingly, the INA will still not recognize marriages between same-sex couples. With DOMA remaining law, same-sex binational families, like de Leon's or Tan's, will soon have to choose between violating the law, separating, or living in exile. This painful choice could be avoided if DOMA is judicially overturned. Precedent set in current federal challenges to DOMA, the DOJ's new stance on DOMA, and a federal challenge to a "same-sex marriage" ban may provide the path necessary for same-sex binational couples. Otherwise, these families will need to turn to immigration-specific legislation that sidesteps DOMA by granting rights to their families without invoking the word "marriage."

III. ENDING DOMA AND ITS IMPLICATIONS FOR IMMIGRATION

The largest obstacle in the way of immigration equality for same-sex binational couples is DOMA.[85] One solution is a legislative repeal of DOMA, though that is unlikely in the 112th Congress. The other path to equality is a judicial overturning of DOMA, which became more probable after the recent decisions in *Gill v. Office of Personnel Management*[86] and *Massachusetts v. U.S. Department of Health and Human Services* ("*Mass. v. HHS*"),[87] and the DOJ's new stance on sexual-orientation classifications. This part analyzes both

transcript-of-q-and-with-president.html. Vice President Biden echoed this outlook; on the heels of the Don't-Ask-Don't-Tell repeal, Biden remarked that a national consensus on gay marriage is "an inevitability." Stephanie Samuel, *DOMA Repeal Not Likely to Happen Soon Despite Biden's Remarks*, CHRISTIAN POST (Dec. 27, 2010, 3:39 PM), http://www.christianpost.com/article/20101227/doma-repeal-not-likely-to-happen-soon-despite-bidens-remarks/.

83. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 23, 2011, at A1, *available at* http://www.nytimes.com/2011/02/24/us/24marriage.html.

84. *Id.*

85. As explained above, binational same-sex couples are precluded from family-based sponsorship because for all federal purposes DOMA defines marriage as a union between only a man and a woman. *See supra* text accompanying note 67.

86. 699 F. Supp. 2d 374 (D. Mass. 2010).

87. 698 F. Supp. 2d 234 (D. Mass. 2010).

holdings and how same-sex binational couples can exploit them to receive family-based immigration benefits.

A. Legislative Repeal of DOMA: Far-Reaching but Unlikely

The possibility of a legislative repeal of DOMA may be slight, but it would provide the clearest path to immigration equality for same-sex couples. Recognizing the inequalities inherent in DOMA and the large change in public opinion since 1996,[88] in 2009 the House introduced the Respect for Marriage Act—a legislative repeal of DOMA.[89] Beyond its introduction, there was little movement on the bill.[90] Even less movement is likely in the 112th Congress.[91] On the other hand, Vice President Biden predicted—after the repeal of "Don't Ask, Don't Tell" (DADT)—that the American people would encourage President Obama to act on the repeal of DOMA as he did with DADT.[92] Then, on the heels of the DOJ's announcement to no longer defend DOMA, Democrats in both houses of Congress introduced repeals of DOMA.[93] In July 2011, the Senate held the first ever hearing on the repeal of DOMA and, as predicted by Biden, President Obama came out in support of the repeal.[94]

88. *See supra* notes 79–80 and accompanying text.

89. Representatives Jerrold Nadler, Tammy Baldwin, and Jared Polis introduced the Respect for Marriage Act on September 15, 2009. H.R. 3567, 111th Cong. (2009).

90. The bill was referred to subcommittee, but there was no hearing on the bill and no sister bill was introduced in the Senate. *Bill Summary & Status: 111th Congress (2009–2010) H.R.3567*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.03567: (last visited Apr. 5, 2011).

91. Every cosponsor of the Respect for Marriage Act was a Democrat. *Id.* With the House shifting to Republican control in the 112th Congress, it is unlikely a Democrat-only sponsored bill will pass. Alan Silverleib, *New Congress Set to Convene with 'Tough Decisions' on Tap*, CNN POLITICS (Jan. 5, 2011 11:45 AM), http://politicalticker.blogs.cnn.com/2011/01/05/new-congress-set-to-convene-with-tough-decisions-on-tap/.

92. Samuel, *supra* note 82. Many thought DADT would not be repealed, but it ultimately was on December 18, 2010. Ed O'Keefe, *'Don't Ask, Don't Tell' Is Repealed by Senate; Bill Awaits Obama's Signing*, WASH. POST (Dec. 19, 2010, 12:10 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/18/AR2010121801729.html. With enough political pressure, DOMA may fall as well.

93. Ashby Jones, *Dems in Congress Launch Effort to Kill DOMA*, WSJ LAW BLOG (Mar. 16, 2011, 5:50 PM), http://blogs.wsj.com/law/2011/03/16/dems-in-congress-launch-effort-to-kill-doma/.

94. David Nakamura, *Obama Backs Bill to Repeal Defense of Marriage Act*, POSTPOLITICS (July 19, 2011), http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI_story.html.

If Congress were to repeal DOMA, same-sex binational couples would need to look no further than the INA for immigration equality. Unlike all of the other options for achieving immigration equality, the repeal of DOMA would not require court action. A congressional repeal would show the federal government's clear intent to recognize that all marriages are valid where they were performed. Same-sex binational couples would only need to get married before they could apply for spousal sponsorship under the INA. While conflicting state policies regarding marriages of same-sex couples may lead to additional complications, a legislative repeal of DOMA would leave little federal obstruction to same-sex binational couples' paths to immigration equality.[95] This assumes that the Respect for Marriage Act will pass the House and advance beyond a Senate hearing. The ultimate relief for same-sex binational couples, however, may come from the courts and not from Congress.

B. Federal Court Finds DOMA Unconstitutional

Federal court challenges to DOMA have so far proven successful. Massachusetts, for example, is one of seven jurisdictions that allow same-sex couples to marry,[96] but DOMA prevents federal recognition of those marriages. In response, two separate lawsuits were filed to challenge DOMA as it applied in Massachusetts. U.S. District Judge Joseph Tauro heard both challenges and, on July 8, 2010, found DOMA unconstitutional in both cases.[97] The problem for same-sex binational couples is that neither of these cases directly implicates DOMA's application to immigration. Same-sex couples must use any precedent created on the appeal of these two cases in a subsequent suit either to attack DOMA on its face or, as applied to immigration, to ultimately achieve equality in family-based immigration.

95. The full analysis of immigration equality in a post-DOMA world is in Part V.

96. *See supra* note 77.

97. Abby Goodnough & John Schwartz, *Judge Topples U.S. Rejection of Gay Unions*, N.Y. TIMES, July 8, 2010, at A1, *available at* http://www.nytimes.com/2010/07/09/us/09marriage.html.

1. Two Different Constitutional Theories Lead to Same Result

The first case—*Gill v. Office of Personnel Management*[98]—was filed by the Gay and Lesbian Advocates & Defenders (GLAD).[99] GLAD argued that Section 3 of DOMA[100] is unconstitutional because it denies each plaintiff spousal protection under specific federal programs.[101] Judge Tauro agreed that DOMA, as it applied to the plaintiffs, was a violation of the equal protection principles embodied in the Fifth Amendment.[102] He found all of the government's proposed reasons[103] to be without merit, and, thus, inferred that animus was the only basis for the law.[104] Animus is not a legitimate government interest,[105] so Judge Tauro found DOMA unconstitutional as it applied to the *Gill* plaintiffs.[106]

In a companion case, brought by Massachusetts Attorney General Martha Coakley[107]—*Mass. v. HHS*—Judge Tauro again declared DOMA unconstitutional, though on different grounds. Coakley argued that the federal government—by passing and enforcing Section 3 of DOMA—overstepped its authority, thereby undermining Massachusetts's efforts to recognize same-sex marriages.[108] Both of Coakley's constitutional arguments (based, respectively, on the Tenth Amendment and the Spending Clause) were essentially the same—that Congress has intruded into the

98. 699 F. Supp. 2d 374 (D. Mass. 2010).

99. Press Release, GLAD, GLAD Files Lawsuit Challenging Denial of Critical Federal Benefits to Married Same-Sex Couples (Mar. 3, 2009), *available at* http://www.glad.org/current/pr-detail/glad-files-lawsuit-challenging-denial-of-critical-federal-benefits-to-marri/.

100. Section 3 defines marriage as only between one man and one woman. *See supra* note 67 and accompanying text.

101. The specific federal programs at issue in *Gill* were federal income tax, Social Security, federal employees' and retirees' benefits, and the issuance of passports. Press Release, GLAD, *supra* note 99.

102. *Gill*, 699 F. Supp. 2d at 376–77.

103. *See infra* note 128 and accompanying text.

104. *Gill*, 699 F. Supp. 2d at 396.

105. Romer v. Evans, 517 U.S. 620, 632 (1996).

106. *Gill*, 699 F. Supp. 2d at 397.

107. *See* Martin Finucane, *Mass. Challenges Federal Defense of Marriage Act*, BOS. GLOBE (July 8, 2009, 3:23 PM), http://www.boston.com/news/local/breaking_news/2009/07/mass_to_challen.html.

108. *Id.*

exclusive province of states to define marriage.[109] Judge Tauro found that the federal government impermissibly conditioned the receipt of federal funds on the denial of marriage-based benefits to same-sex married couples.[110] In doing so, DOMA induces Massachusetts to violate the equal protection rights of its citizens, which is an invalid use of Congress' spending power.[111] Further, Judge Tauro found that Massachusetts has the authority to recognize marriages between individuals of the same sex, so the federal government's enforcement of DOMA encroaches on the province of the state, in violation of the Tenth Amendment.[112] Therefore, he ruled DOMA unconstitutional because it exceeds the scope of Congress' spending power and interferes with Massachusetts's domestic-relations law.

2. Promising Precedent, but Narrow

Gill and *Mass. v. HHS* are the first cases to successfully challenge DOMA.[113] If upheld, they will create strong precedent for other challenges to DOMA, but the narrowness of their holdings may limit any immediate impact on same-sex binational couples. These cases will not create nationwide marriage equality, though that is unnecessary for same-sex binational couples to receive immigration benefits.[114] The biggest obstacle for binational same-sex couples after

109. Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 246 (D. Mass. 2010).

110. *Id.* at 248 ("By way of example, the Department of Veterans Affairs informed the Commonwealth in clear terms that the federal government is entitled to 'recapture' millions in federal grants if and when the Commonwealth opts to bury the same-sex spouse of a veteran in one of the state veterans cemeteries, a threat which, in essence, would penalize the Commonwealth for affording same-sex married couples the same benefits as similarly-situated heterosexual couples that meet the criteria for burial in [federal cemeteries].").

111. *Id.* at 248–49.

112. *Id.* at 253.

113. *See* Marcia Coyle, *Massachusetts Case May Be Key in Gay Marriage Fight*, NAT'L L.J. (Aug. 31, 2009), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433430922&slreturn=1&hbxlogin=1 (discussing other challenges to DOMA encountering problems in federal court).

114. Both *Gill* and *Mass. v. HHS* challenged only Section 3 of DOMA, the definitional provision, not Section 2, the cross-state nonrecognition provision. *See supra* notes 66–67 and accompanying text. In other words, neither case can directly spread marriage equality into states that choose not to recognize marriages for same-sex couples. GLAD, FREQUENTLY ASKED QUESTIONS REGARDING THE DECISIONS IN GILL V. OFFICE OF PERSONNEL MANAGEMENT AND COMMONWEALTH OF MASSACHUSETTS V. DEPARTMENT OF HEALTH AND HUMAN SERVICES 7 (2010), *available at* http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/DOMA-FAQ.pdf. It would take a fundamental rights analysis implicated in *Perry v. Schwarzenegger* to spread marriage equality nationwide. *See infra* Part IV.C. Without nationwide marriage equality, same-sex binational couples will have some complications of marriage

Gill and *Mass. v. HHS* is that both cases were as-applied challenges to Massachusetts and the listed federal benefits. Neither case directly implicates immigration law. To end DOMA's discrimination against same-sex binational couples in the context of the INA, another suit must be brought to challenge DOMA on its face or as it applies to immigration.

After *Gill* and *Mass. v. HHS*, two new suits were filed challenging DOMA.[115] While the new suits—*Windsor v. United States*[116] and *Pederson v. Office of Personnel Management*[117]—involve more federal rights than were addressed in *Gill*,[118] there is yet to be a case listing immigration as one of the federal rights denied because of DOMA.[119] If and when such a case is filed, any precedent set on appeal in *Gill* or *Mass. v. HHS* could shape the case's arguments and ultimate outcome.[120]

C. Precedent on Appeal

Any successful suits that same-sex binational couples file attacking DOMA on its face or challenging its application in the immigration context will require an understanding of the legal arguments at play in *Gill* or *Mass. v. HHS*. Any possible precedent created on the appeal of these two cases will be decided on either Tenth Amendment or equal protection grounds, or on both.[121] While

recognition under the INA. However, in a post-DOMA world, most valid marriages will be recognized regardless of state recognition. *See infra* Part V.B.

115. Lisa Keen, *Two More DOMA Court Challenges Filed; Five Cases Now Pending*, KEEN NEWS SERV. (Nov. 9, 2010), http://www.keennewsservice.com/2010/11/09/two-more-doma-court-challenges-filed-five-cases-now-pending/.

116. No. l:10-cv-8435 (S.D.N.Y. Nov. 9, 2010).

117. No. 3:10-cv-1750 (D. Conn. Nov. 9, 2010).

118. *See* Keen, *supra* note 115; John Schwartz, *Gay Couples to Sue over U.S. Marriage Law*, N.Y. TIMES, Nov. 9, 2010 at A20, *available at* http://www.nytimes.com/2010/11/09/us/09marriage.html?_r=1.

119. Some gay and lesbian immigration rights groups oppose challenging immigration laws in court because of the federal government's plenary power over immigration, which may explain the hesitation on filing cases in the DOMA context at this point. *See Same Sex Marriage*, IMMIGR. EQUALITY, http://www.immigrationequality.org/template.php?pageid=154 (last visited Sept. 23, 2010).

120. The DOJ's stance on sexual orientation classifications will also be important in shaping any future lawsuit.

121. Despite a delay, the DOJ ultimately appealed both of Judge Tauro's rulings to the U.S. Court of Appeals for the First Circuit, although no specific grounds for appeal were given. Denis Lavoie, *Feds Appeal Mass. Rulings Against US Marriage Law*, BOS. GLOBE (Oct. 12, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/10/12/feds_appeal_mass_rulings_

each has a different probability of success and will create different legal paths for same-sex binational couples, the likeliest and easiest argument for same-sex binational couples to build on would be overturning DOMA based on the animus reasoning in *Romer*.[122]

1. Federalism Argument Unlikely to Succeed

The Tenth Amendment argument in *Mass. v. HHS* is not likely to be upheld on appeal,[123] and it provides little traction for same-sex couples to attack DOMA. The federal government may indeed overstep its power by regulating marriage, but the same is not true in immigration. Constitutional grants and the precedent of the so-called plenary power clearly give the federal government the ability to control immigration.[124] So affirming will do little to help same-sex binational couples who are directly challenging immigration laws. On the other hand, if the federalism argument were upheld on appeal, it would provide the basis for other states to attack DOMA. The outcome of a state-by-state approach is unknown, but such a steady weakening of DOMA could put pressure on Congress to repeal the Act. Since Judge Tauro's federalism arguments are self-defeating,[125] this Article does not discuss this scenario any further.

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against_us_marriage_law. Without a full brief from the DOJ and no date set for appeal, the ultimate holding of *Gill* or *Mass. v. HHS* on appeal is beyond the scope of this Article.

122. One possibility on appeal in the First Circuit is reversal of both the equal protection and the federalism arguments (Tenth Amendment and exceeding Spending Clause power). This would leave DOMA intact and provide strong precedent for DOMA's constitutionality, if it is attacked in other circuits. Since this option would not provide any path to immigration equality, it is not further discussed. Same-sex binational couples nonetheless should understand that there is a strong likelihood of a reversal. For discussion of a reversal see Jack M. Balkin, *Be Careful What You Wish for Department: Federal District Court Strikes Down DOMA*, BALKINIZATION (July 8, 2010, 6:35 PM), http://balkin.blogspot.com/2010/07/be-careful-what-you-wish-for-department.html.

123. *See, e.g.*, *id.*

124. For an explanation of the plenary power, see *infra* notes 211–215 and accompanying text.

125. Judge Tauro argued marriage is distinctly a state law domain, Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 250 (D. Mass. 2010), while also providing a list of federal programs that regulate marriage and deny same-sex married couples benefits. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 391 n.126 (D. Mass. 2010). In essence, Judge Tauro provided a history of the federal government's involvement in family structure, but then said that the federal government cannot interfere with the state in these areas. Balkin, *supra* note 122. Also, the Tenth Amendment test that Judge Tauro applied is on shaky precedential grounds. He even acknowledged that there is Supreme Court precedent contrary to his test, but defended his test on First Circuit precedent after the Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Mass. v. HHS*, 698 F. Supp. 2d at 252 n.154. However, further review of the First Circuit precedent shows that it

2. Equal Protection Precedent Could Shape Future DOMA Challenges

Same-sex binational couples will have an easier time challenging DOMA as it applies to immigration based on an equal protection argument. This first requires the First Circuit to agree with Judge Tauro's reasoning in *Gill* that no purpose exists for DOMA besides prejudice.[126] Such precedent could be used to bolster the arguments in newly filed DOMA challenges and in any future challenges to DOMA, but a Supreme Court decision would be necessary to end DOMA's effects nationwide. Assuming that the Court grants certiorari and accepts the equal protection argument, it will most likely apply rational basis review. Judge Tauro avoided applying a strict scrutiny test since DOMA failed under rational basis,[127] so it would be unnecessary for the Court to address strict scrutiny analysis.

Gill rests on a *Romer*-like animus rationale; if the only rational basis for DOMA is animus, it cannot stand. The biggest issue for the Court to consider, then, is the government's interests in passing DOMA. In defending DOMA, the DOJ chose to abandon the initial four congressional reasons for passing DOMA[128] and instead proposed two new interests: preserving the status quo and taking an incremental response to social problems.[129] The DOJ's abandonment of DOMA's original rationale suggests an implicit recognition of the lack of legitimate goals in light of *Romer* and *Lawrence*.[130] While Judge Tauro's analysis did not emphasize this point, the DOJ's shift will have traction in later challenges to DOMA, especially in light of the DOJ's new position on sexual-orientation classifications after

relied on a Supreme Court case prior to *Garcia*. *See* United States v. Bongiorno, 106 F.3d 1027, 1033 (1st Cir. 1997) (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287–88 (1981)).

126. *Gill*, 699 F. Supp. 2d at 397.

127. *Id.* at 387.

128. The House Report listed four standard arguments (similar to the Proposition 8 proponents' arguments) for not recognizing so-called same-sex marriage—procreation, morality, tradition, and preserving resources. H.R. REP. No. 104-664 at 12–18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2920–22.

129. *Gill*, 699 F. Supp. 2d at 390.

130. *See* Jack M. Balkin, *More on Gill v. OPM and the Equal Protection Argument Against DOMA*, BALKINIZATION (July 9, 2010, 2:15 PM), http://balkin.blogspot.com/2010/07/more-on-gill-v-opm-and-equal-protection.html.

Gill.[131] Even without the DOJ's implication that past rationales are insufficient, there is some legislative history that indicates Congress passed DOMA because of animus toward gay and lesbians.[132]

Assuming that the Court agrees with Judge Tauro that the original rationale and the new DOJ argument in support of DOMA are illegitimate,[133] the only conceivable rationale left is animus. Animus is not a legitimate government interest, so DOMA cannot stand.[134] Though the *Gill* litigation only technically applies to same-sex couples applying for the listed federal benefits in Massachusetts (or, at most, the seven jurisdictions that allow the marriage of same-sex couples), it would be difficult for DOMA to stand up to further challenges under the animus rationale. If DOMA has no legitimate purpose besides animus, it cannot withstand even rational basis review and should be struck down completely, not just in Massachusetts. Thus, same-sex binational couples could easily file another case attacking DOMA on its face using the precedent that is set in a *Gill* appeal.[135] Though it is not certain that the Supreme Court would agree with Judge Tauro, such a ruling would certainly remove the largest obstacle to family unification for same-sex binational families—DOMA.

D. Perry *and New DOJ Stance Bolster* Gill *Holding*

While *Gill* struck down DOMA under rational basis review, DOMA may potentially be subject to heightened scrutiny. On February 23, 2011, Attorney General Eric Holder informed House Speaker John Boehner that President Obama believes that DOMA Section 3 is unconstitutional.[136] This development arose out of the

131. *See infra* discussion accompanying notes 136–140.

132. *See infra* notes 194–195 and accompanying text.

133. It must be assumed that the Supreme Court would accept Judge Tauro's reasoning in order to discuss the possible effect of a ruling on same-sex binational couples. However, it is far from clear that such a ruling would happen in the current Court. *See* Balkin, *supra* note 130.

134. *Gill*, 699 F. Supp. 2d at 396 (citing Heller v. Doe, 509 U.S. 312, 321 (1993)) ("'[W]hen the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest,' this court finds that DOMA lacks a rational basis to support it.").

135. The animus argument would not be as strong for an as-applied-to-immigration challenge. The legislative history may show that there is general animus toward so-called same-sex marriage, but there is no evidence of specific animus toward binational couples.

136. Letter from Attorney General Eric H. Holder, Jr. to Speaker John A. Boehner 1 (Feb. 23, 2011) [hereinafter Eric Holder Letter], *available at* http://www.scribd.com/doc/49404879/Attorney-General-Holder-s-Letter-to-John-Boehner-on-DOMA-Appeal.

Windsor and *Pederson* cases that were filed after *Gill*.[137] Those cases are proceeding in the Second Circuit, where there is no precedent on the level of scrutiny that a court should apply to classifications based on sexual orientation.[138] Accordingly, the DOJ reviewed the criteria for judging whether heightened scrutiny applies and concluded that classifications based on sexual orientation should receive heightened scrutiny.[139] While the DOJ will continue to defend DOMA if rational basis applies, the DOJ feels that, under heightened scrutiny, DOMA is unconstitutional as it applies to same-sex couples whose marriages are legally recognized under state law.[140]

This development is welcome news for same-sex binational couples who can use the DOJ's rationale to attack DOMA on its face or as it applies to immigration.[141] The DOJ's new stance has already proved helpful in stopping deportation proceedings of same-sex binational couples, and members of Congress have asked the Obama administration to halt the denial of green card applications of same-sex foreign spouses.[142] However, the DOJ is not the final arbiter on this; the federal courts still have to weigh in. With the *Windsor* and *Pederson* cases pending, the House of Representatives will step in to

137. *Id.*

138. *See id.*

139. *Id.* at 2–3.

140. *Id.* at 5.

141. Savage & Stolberg, *supra* note 83 ("If the courts agree with the administration's view of how to evaluate gay-rights claims of official discrimination, it could open the door to new legal challenges to many other government policies that treat gay people unequally—including federal laws that make it easier for noncitizen spouses to apply for legal residency . . . .").

142. An immigration judge and government attorneys agreed to halt deportation orders for an Argentine woman who was legally married to a woman in Connecticut, citing the DOJ's stance on DOMA as a likely reason. Kristen Hamill, *Woman Escapes Deportation Until Status of Same-Sex Marriage Made Clear*, CNN (Mar. 25, 2011), http://www.cnn.com/2011/US/03/25/new.york.marriage.law/index.html?section=cnn_latest. Also, the federal government, through Immigration and Customs Enforcement, canceled a deportation order for a Venezuelan man in New Jersey who is legally married to a man, saying that this deportation "is not [a] . . . priority at this time." While it is only one decision, immigration lawyers see this as a "significant shift" in policy for immigrants in same-sex marriages. Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigration in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16. Several members of Congress sent a letter to Attorney General Eric Holder and Secretary of Homeland Security Janet Napolitano requesting that they halt removals proceedings and hold same-sex marriage-based immigration petitions in abeyance. Chris Geidner, *Senators Kerry, Leahy, 10 Others Ask DOJ, DHS to Hold Same-Sex Bi-National Couples' Immigration Petitions*, POLIGLOT (Apr. 6, 2011 2:42 PM), http://www.metroweekly.com/poliglot/2011/04/senators-kerry-leahy-10-others.html. Then in May 2011, Attorney General Eric Holder vacated a decision by the BIA in order to determine whether a person in a New Jersey civil union could be considered a spouse under immigration law. Matter of Dorman, 25 I&N Dec. 485 (A.G. 2011).

defend the law.[143] Lawyers for the House filed briefs in the *Windsor* case seeking a deferential rational basis review, arguing that sexual orientation is not immutable and gays and lesbians are not politically powerless.[144]

Without any precedent on point, it is uncertain how the arguments will fare in the Second Circuit. Any precedent set in *Perry v. Schwarzenegger*[145] may predict the success of the heightened-scrutiny argument. The *Perry* litigation is over a state law, not DOMA, but it analyzes suspect classifications and heightened scrutiny as they apply in that state.[146] With the new DOJ stance on sexual orientation classification, the heightened scrutiny rationale employed in *Perry* may have more traction.[147] On the other hand, the *Perry* equal protection holding was grounded in the animus toward gay and lesbians—similar to the *Gill* holding. Thus, rational basis may indeed be the applicable standard in the *Perry* appeal. If *Perry* is decided on rational basis review, the House of Representatives' argument to apply rational basis to DOMA would be bolstered. So same-sex binational couples may ultimately still need to rely on the *Gill* rationale. With many pending issues before the courts, it is unknown whether *Perry* or *Gill* will reach the Supreme Court first, if at all. Regardless, same-sex binational couples should understand that any precedent that the Supreme Court sets in *Perry* will illuminate the successful arguments in *Gill*, the new DOMA cases (*Windsor* and *Pederson*), and any future cases challenging DOMA on its face or as it applies to family-based immigration.[148]

143. Lisa Mascaro & David G. Savage, *GOP Starts Work on Legal Defense of Marriage Law*, L.A. TIMES, March 5, 2011, at A9.

144. Brian Moulton, *House Lawyers Explain Why Discrimination Against Gays and Lesbians Is Okay*, HRC BACK STORY (Aug. 3, 2011 12:53 PM), http://www.hrcbackstory.org/2011/08/house-lawyers-explain-why-discrimination-against-gays-and-lesbians-is-okay/#.TjnVaHOxric.

145. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

146. *See infra* discussion Part IV.D.

147. The plaintiffs in *Perry* filed a motion with the Ninth Circuit to lift the stay on Feb. 23, 2011, and cited the rationale in Eric Holder's letter subjecting classifications based on sexual orientation to heightened scrutiny. Motion to Vacate Stay Pending Appeal of Plaintiffs-Appellees Kristin M. Perry et al. at 4, 7, Perry v. Schwarzenegger, No. 10-16696 (9th Cir. Feb. 23, 2011), 2011 WL 638819, at *4, *7; Eric Holder Letter, *supra* note 136.

148. If the Supreme Court were to decide *Gill* using a *Romer* animus rationale, like Judge Tauro did, then it would be difficult for the Court to not affirm *Perry* given Judge Walker's reliance on that rationale. Only if the cases were decided on different grounds—not equal protection—is the combined outcome clearer. If the Court were to find a fundamental right in

IV. *PERRY* AND ITS IMPLICATIONS FOR IMMIGRATION

Independent of *Gill* and *Mass. v. HHS*, another federal case may be used to attack DOMA and its denial of family-based immigration to same-sex binational couples. One step toward immigration equality for same-sex binational couples would be nationwide marriage equality. A current federal court case, *Perry v. Schwarzenegger*, may produce this result. If the Supreme Court affirms the lower court's decision declaring marriage to be a fundamental right for all adult couples (including gays and lesbians), it is unlikely that DOMA could stand.[149] However, this is only one possible outcome of the *Perry* litigation. The Court could also decide the case on different rationales: equal protection grounds or a limited basis that applies only to California. These possible holdings in *Perry* could form the bases of subsequent legal challenges to DOMA, which are necessary for same-sex binational couples to ultimately achieve immigration equality.

A. Perry*: History, Holding, and Appeal*

The *Perry* litigation arises out of the marriage equality battle in California. On May 15, 2008, the California Supreme Court held that the California Constitution guarantees same-sex couples marriage rights equal to those of opposite-sex couples.[150] This decision was implicitly overturned when voters passed Proposition 8 ("Prop 8") on November 5, 2008.[151] Prop 8 added a new provision to the California Constitution, stating that "[o]nly marriage between a man and a woman is valid or recognized in California."[152] The amendment was

Perry, then DOMA would be subject to strict scrutiny and almost certainly struck down. If the Court were to decide DOMA on the *Mass. v. HHS* Tenth Amendment grounds, then *Perry* would not be implicated. The ultimate interplay between *Perry*, *Gill*, and maybe even *Mass. v. HHS* will not be clear for some time, at least until the U.S. Courts of Appeals rule.

149. *See infra* Part IV.C.

150. *In re* Marriage Cases, 183 P.3d 384, 857 (Cal. 2008).

151. Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Election 2008: Gay Marriage*, L.A. TIMES, Nov. 5, 2008, at A2.

152. CAL. SEC'Y OF STATE, TEXT OF PROPOSED LAWS: PROPOSITION 8, at 128 (2008), *available at* http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8.

challenged under the California Constitution, but was ultimately upheld by the California Supreme Court.[153]

The American Foundation for Equal Rights (AFER) filed a suit challenging Prop 8 under the U.S. Constitution.[154] Chief U.S. District Judge Vaughn R. Walker fast-tracked the trial[155] and issued his ruling on August 4, 2010, finding Prop 8 unconstitutional as a violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[156] He ruled that marriage is a fundamental right and that excluding same-sex couples from marriage was not rationally related to any legitimate state interest.[157] Judge Walker therefore inferred that Prop 8 was based on either moral disapproval of homosexuality or animus toward gays and lesbians, which are both improper justifications for legislation.[158] Thus, Prop 8 failed to satisfy rational basis review and was struck down.[159]

The proponents of Prop 8 appealed to the U.S. Court of Appeals for the Ninth Circuit, which stayed Judge Walker's order.[160] The Ninth Circuit heard oral arguments on December 6, 2010, regarding the Prop 8 proponents' standing to appeal and the merits of Judge Walker's ruling. If the appellate court finds that the proponents of Prop 8 have no standing, Judge Walker's opinion would stand, returning California to the list of U.S. jurisdictions that grant

153. Strauss v. Horton, 207 P.3d 48, 153 (Cal. 2008).

154. Chuleenan Svetvilas, *Challenging Prop. 8: The Hidden Story*, CAL. LAWYER (Jan. 2010), http://www.callawyer.com/story.cfm?eid=906575&evid=1. AFER's case was argued by Ted Olson and David Boies, who famously opposed each other in *Bush v. Gore*. *Id.* This case was filed against the wishes of many gay and lesbian organizations that were worried about the risks of a negative decision. Andrew Harmon & Neal Broverman, *Legal Experts Concerned by Fed Prop. 8 Case*, ADVOCATE (May 27, 2009), http://www.advocate.com/Politics/Marriage_Equality/Legal_Experts_Outraged_by_Federal_Prop__8_Case/.

155. Ashby Jones, *Judge Puts Boies and Olson's Prop. 8 Challenge on Fast Track to Trial*, WALL ST. J. (July 1, 2009), http://blogs.wsj.com/law/2009/07/01/judge-puts-boies-and-olsons-prop-8-challenge-on-fast-track-to-trial/

156. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

157. *Id.* at 994–96. Judge Walker analyzed the six purported interests set forth by the proponents of Prop 8 and found that none had merit or support. *See id.* at 998–1002.

158. *Id.* at 1002 ("[A]nimus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.").

159. Usually when a fundamental right is at stake, strict scrutiny applies. However, Judge Walker did not apply such scrutiny since even deferential rational basis could not be met. For explanation of the levels of scrutiny, see *supra* note 74.

160. Carolyn Tyler, *9th Circuit Grants Indefinite Stay in Prop 8 Case*, ABC 7 (Aug. 17, 2010), http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=7612521.

marriage rights to same-sex couples.[161] This would have no effect on binational couples seeking equal immigration rights since federal law would be left unchanged. If, however, the Ninth Circuit rules on the merits,[162] then the U.S. Supreme Court could hear the case, potentially leading to a change in federal law and relief for same-sex binational couples.

B. Reversal Would Be a Setback

The Supreme Court could, of course, not uphold *Perry*.[163] The Court could find that marriage is not a fundamental right that extends to gays and lesbians and that Prop 8 does not violate equal protection.[164] Same-sex couples then would have no precedent on which to build a DOMA challenge. In fact, a reversal would likely set back the *Gill* litigation, since that decision relies on the animus rationale in *Romer*. If the Court does not agree with Judge Walker's analysis of *Romer* as it applies to Prop 8, it is very unlikely that the Court would find animus in the passage of DOMA. With a defeat in *Perry*, efforts to achieve immigration equality through marriage litigation would stall.

A Supreme Court affirmance of *Perry* would be necessary, but not sufficient, to remedy current family-based immigration inequality. However, whether affirmation could lead to federal marriage equality and a basis for challenging the inequality in family-based immigration depends on the scope of the holding. There are two different constitutional grounds on which reviewing

161. The Ninth Circuit certified to the California Supreme Court the question of whether Prop 8 proponents have standing. The California Supreme Court will decide this question with a hearing to be held "as early as September [2011]." Maura Dolan, *State Justices to Take Up Prop. 8: At Issue Is Whether the Measure's Backers Have Legal Standing to Defend It in Court*, L.A. TIMES, Feb. 17, 2011, at AA1, *available at* http://www.latimes.com/news/local/la-me-proposition8-20110217,0,2933016.story.

162. This Article does not speculate on how the Ninth Circuit would rule. As the Associated Press states, the Ninth Circuit is the "least predictable" appeals court. Paul Elias, Associated Press, *Gay Marriage Appeal Faces Uncertain Future Before Nation's Largest, Least Predictable Appeals Court: Analysis*, CLEVELAND.COM (Aug. 5, 2010), http://www.cleveland.com/nation/index.ssf/2010/08/gay_marriage_appeal_faces_unce.html.

163. The Court could also deny certiorari, leaving any Ninth Circuit precedent standing.

164. This Article does not analyze the reasoning of such a decision because it would not change the state of the law for same-sex binational couples, which is the focus of this Article. The reasoning could likely follow that of the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which found no fundamental right to homosexual sodomy in the history and traditions of the United States.

courts could uphold *Perry*: due process or equal protection. Each ground presents a unique argument that same-sex couples can use in challenging DOMA and its effect on immigration law.

C. Fundamental Right to Marry Will Bring an End to DOMA

A broad holding affirming Judge Walker's ruling that Prop 8 violates the Due Process Clause of the Fourteenth Amendment would not only bring about nationwide marriage equality but likely lead to family-based immigration for same-sex binational couples.[165]

Affirming Judge Walker's due process holding requires the Court to find that same-sex couples possess the fundamental right to marry. Once a fundamental right becomes constitutionally protected, strict scrutiny applies to all government action that impinges on that right. Under this exacting standard, it is unlikely that Prop 8 or any other state law denying marriage to same-sex couples could stand. This broad ruling would provide a strong precedent for same-sex binational couples who are challenging unequal immigration laws. *Perry* does not directly implicate DOMA, but it could be used to overturn the law in a new case that is brought under the Fifth Amendment's Due Process Clause.[166] If marriage is a fundamental right that extends to gays and lesbians, DOMA impinges that right and a court would likely overturn it under strict scrutiny.[167]

165. Predicting the likelihood that the current Supreme Court will constitutionally enshrine marriage equality is beyond the scope of this Article, but it is also something that same-sex binational couples must consider in evaluating their options for obtaining immigration equality. For a discussion of the possibility of the Supreme Court upholding Judge Walker's due process arguments, see Michael C. Dorf, *A Federal Judge Strikes Down California's Proposition 8: Will the Ruling Ultimately Advance or Retard Civil Rights for LGBT Americans*, FINDLAW (Aug. 9, 2010), http://writ.news.findlaw.com/dorf/20100809.html ("It is widely assumed that at least four of the current Justices—Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito—would vote to reject a right to same-sex marriage."). *See also* John Schwartz, *In Same-Sex Ruling, an Eye on the Supreme Court*, N.Y. TIMES, Aug. 4, 2010, http://www.nytimes.com/2010/08/06/us/06assess.html (citing Professor Douglas NeJaime's explanation that "even the four more liberal justices on the Court might shy away from a sweeping decision that could overturn same-sex marriage bans across the country").

166. A *Perry* decision would not ipso facto mean that DOMA is overturned. *Perry* rests on the Fourteenth Amendment, which applies only to the states, and does not challenge any federal laws. Another case would be necessary to assert that DOMA impedes on the fundamental right to marry declared in *Perry*. DOMA would be challenged under Fifth Amendment due process, which applies to federal legislation.

167. This assumes that there is no compelling reason to exclude gays and lesbians from marriage that is narrowly tailored to that purpose. *See supra* note 74.

Without DOMA and with a fundamental right to marry, same-sex binational couples could get married in all states, and the federal government would have no statutory reason for refusing to recognize such marriages. Since the INA does not define "spouse," the "valid where performed" rule would apply to same-sex couples.[168] Gay and lesbian U.S. citizens could then sponsor their spouses as immediate relatives. Thus, a holding that gays and lesbians have the fundamental right to marry would bring about immigration equality for same-sex binational couples. However, the Court could avoid the fundamental-right issue by deciding the case solely on equal protection grounds.

D. Many Equal Protection Arguments: Most Lead to End of DOMA

The equal protection analysis gives the Court greater flexibility in determining the scope of its ruling, but the analysis also provides more avenues for same-sex couples to challenge DOMA. The Court's could ground its equal protection ruling in several different rationales: finding sexual orientation to be a suspect classification, finding discrimination based on gender, or finding that the law fails to meet the rational basis test because it is motivated by animus or moral disapproval alone. All of these possible holdings would provide different legal arguments for same-sex binational couples who are challenging immigration equality.

1. Suspect Classification: Broad, but Unlikely to Be Considered

Aside from the Court ruling that marriage is a fundamental right that same-sex couples enjoy, the next most sweeping decision for same-sex couples (including binational couples) would be for the Court to find that classifications that are based on sexual orientation are suspect. Then, all state action discriminating against gays and lesbians would be subject to some heightened level of scrutiny.[169] Same-sex binational couples could steer clear of the marriage

168. For a full analysis of the INA definition of spouse without DOMA, see *infra* Part V.

169. Since the Court has yet to consider whether gays and lesbians are a suspect class, it is unclear which level of scrutiny would apply. An analysis of the appropriate level of scrutiny may look similar to the DOJ's rationale behind deciding that heightened scrutiny is applicable to sexual orientation classifications. *See* Eric Holder Letter, *supra* note 136.

argument and challenge the INA's treatment of gay and lesbian couples directly under equal protection.[170] The problem is that the INA is not facially discriminatory, as it neither defines "spouse" nor explicitly excludes gays and lesbians. Without facial discrimination, proof of a discriminatory purpose is necessary.[171] It will be difficult to find such a purpose within the INA. On the other hand, DOMA is facially discriminatory, so no showing of a discriminatory purpose would be required. Thus, any litigation would need to focus on attacking DOMA on its face or as it applies to immigration. The ultimate result would depend on whether the Court, in a *Perry* ruling, chose to apply strict scrutiny—which is usually fatal to the challenged law—or some intermediate scrutiny akin to gender discrimination.[172] While potentially yielding a promising result for same-sex binational families, an equal protection holding based on a suspect class is not likely in *Perry*, since Judge Walker did not explicitly rule on those grounds and the Supreme Court avoided a similar holding in *Lawrence*.[173]

2. Gender-Based Discrimination

However, Judge Walker did conclude that discrimination based on sexual orientation is equivalent to discrimination based on gender.[174] Perry was denied marriage to a woman because she was a woman. If Perry were a man, Prop 8 would not prohibit her

170. The INA would have to be challenged under the equal protection principles interpreted in the Fifth Amendment's Due Process Clause. Although the Fifth Amendment's text has no equal protection language, the Court has interpreted an equal protection component to the amendment's Due Process Clause. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

171. CHEMERINKSY, *supra* note 74, at 793.

172. For a discussion of levels of scrutiny, see *supra* note 74. While the DOJ is not a party to *Perry*, its new stance on sexual orientation classifications could influence the discussion of suspect classifications here, which would then point the Court toward intermediate scrutiny. *See* Eric Holder Letter, *supra* note 136.

173. 539 U.S. 558, 586 (2003) (Scalia, J., dissenting). Since *Lawrence*, the Court has hinted at protecting sexual orientation. Justice Ginsburg's majority opinion in *Martinez* stated, "Our decisions have declined to distinguish between status and conduct in [the context of sexual orientation]." Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2990 (2010). Yet, the case was decided solely on First Amendment grounds, so that is only dicta, not law.

174. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010). The terms "sex" and "gender" are often used interchangeably in these cases, but scholarly debate questions whether the terms actually have different meanings. WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 253–55 (3d. ed. 2008).

marriage.[175] On the other hand, Prop 8 is arguably gender neutral because it applies equally, prohibiting so-called same-sex marriage regardless of gender. However, the Supreme Court in race discrimination cases has expressly rejected the "equal application" argument.[176] There is debate whether the Court would also reject this argument in the sexual orientation context.[177] If the Supreme Court were to find that the equal application argument also fails in this context, then it would apply intermediate scrutiny and strike down Prop 8.[178]

Then, same-sex binational couples could challenge DOMA under this heightened scrutiny precedent, since DOMA similarly prevents recognition of marriage based on the gender of the individuals involved.[179] Or, same-sex binational couples could directly challenge immigration laws that deny family-based immigration solely because of the couple's gender (male-male or female-female). The Court has previously applied heightened scrutiny in gender discrimination claims against immigration laws,[180] so this argument has solid support. The only problem for same-sex binational couples is getting the Court to hold that sexual orientation discrimination is akin to gender discrimination. The Court may avoid this ruling by deciding the case based on rational basis review.[181]

175. *Perry*, 704 F. Supp. 2d at 996. ("Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex.").

176. *See* Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 480–87 (2007).

177. *Id. Compare* Hernandez v. Robles, 855 N.E.2d 1, 10–11 (N.Y. 2006) ("Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in *Loving*."), *with Hernandez*, 855 N.E.2d at 29 (Kaye, C.J., dissenting) ("That the statutory scheme applies equally to both sexes does not alter the conclusion that the classification here is based on sex.").

178. This assumes that there is no important government interest. *See* CHEMERINSKY, *supra* note 74.

179. Section 3 defines marriage as between one man and one woman. *See* text accompanying *supra* note 67.

180. Nguyen v. INS, 533 U.S. 53 (2001) (applying heightened scrutiny while ultimately upholding an immigration law because there are real differences between the sexes in relation to the birth process).

181. While he found gender discrimination, Judge Walker did not apply heightened scrutiny because he found that Prop 8 failed to satisfy even rational basis review. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). The Court could similarly avoid the gender argument by concentrating only on rational basis review.

3. Rational Basis Can Be Used to Strike Down Proposition 8 and DOMA

Judge Walker's equal protection holding, like Judge Tauro's holding in *Gill,* rests on rational basis review. Although rational basis is the most deferential standard of review, the Court used it to strike down laws discriminating against homosexuals in *Romer* and *Lawrence*. If the Court follows that precedent to strike down Prop 8, then same-sex binational couples could use the same reasoning to facially challenge DOMA as a violation of equal protection.

Judge Walker indicated that moral disapproval of so-called same-sex marriage was the only reason for Prop 8.[182] Per Justice O'Connor's concurring opinion in *Lawrence*, "[M]oral disapproval, without any other asserted state interest," has never been a rational basis for legislation.[183] Affirming *Perry* based on this moral disapproval argument would provide strong precedent for same-sex binational couples to challenge DOMA as a violation of equal protection;[184] DOMA's legislative history demonstrates that many members of Congress supported DOMA because they believed homosexuality to be immoral.[185]

The obstacle for same-sex binational couples is showing that there is no justification for DOMA besides morality. Since Prop 8 supporters advance similar justifications to those that appear in the DOMA legislative history, the Court's overturning of Prop 8 would strongly impact any DOMA challenge.[186] The only obstacles are the

182. *Id.* at 998–1003.

183. Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring). The majority in *Lawrence* was not explicit on whether morality is a sufficient basis for legislation, so it is beyond the scope of this Article to predict the Court's treatment of this issue.

184. DOMA would have to be challenged under the Fifth Amendment, unlike the Prop 8 challenge under the Fourteenth Amendment. *See supra* note 170 and accompanying text.

185. *See, e.g.*, 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Tom Coburn) (calling homosexuality "immoral" and "depraved"); Aff. of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 (reflecting Congress's "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality").

186. Prop 8 supporters cite

> (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples.

DOJ's new justifications in defending DOMA,[187] which Judge Tauro has already found to lack merit in *Gill*.[188] In all, DOMA would not likely withstand an equal protection challenge if the Court were to find Prop 8 unconstitutional under Justice O'Connor's morality-alone rationale.

The problem for same-sex binational couples is that the Court may want to avoid an explicit *Perry* holding based on O'Connor's morality-alone rationale since many laws are, in fact, based on morality.[189] The Court could root a more limited opinion in the animus rationale from *Romer*. Judge Walker's finding of fact implicates the stigma that caused the passage of Prop 8.[190] As in *Romer*, the Court could find that Prop 8 is "born of animosity" toward gays and lesbians.[191] This is not a legitimate government interest,[192] so Prop 8 would fail to survive even a rational basis review.

Assuming that the Court affirms *Perry* based on *Romer*, same-sex binational couples would again need to use that precedent to mount a challenge against DOMA.[193] It is clear that Congress enacted DOMA knowing that it presented a potential constitutional issue under *Romer*.[194] However, the existence of a constitutional issue does not necessarily mean that the bill was born of animosity. But there is

Perry, 704 F. Supp. 2d at 998. DOMA's original justifications were procreation, morality, tradition, and preserving resources. *See supra* note 128.

187. *See supra* text accompanying note 129.

188. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 391–96 (D. Mass. 2010).

189. Lawrence v. Texas, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting).

190. *Perry*, 704 F. Supp. 2d at 973–74.

191. Romer v. Evans, 517 U.S. 620, 634 (1996). The Court could of course distinguish Prop 8 from *Romer*. Prop 8 applies narrowly to marriage and does not restrict same-sex couples' use of the political process, unlike the Colorado amendment that was "far reaching" and "forbid[] reinstatement" of the protections that it had taken away. *Id.* at 627.

192. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

193. This challenge would again be under the equal protection principles interpreted in the Fifth Amendment. *See supra* note 170 and accompanying text.

194. *See, e.g.*, 142 CONG. REC. S10,100-02 (daily ed. Sept. 9, 1996) (statement of Sen. Kennedy) ("Scholarly opinion is clear: [DOMA] is plainly unconstitutional."); *A Bill to Define and Protect the Institution of Marriage: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 48 (1996) (statement of Cass R. Sunstein, Professor, University of Chicago Law School) ("Insofar as [DOMA] draws the particular line that it does, it risks running afoul of *Romer*'s prohibition on laws based on 'animus' against homosexuals.").

legislative history that points to Congress' disapproval of homosexuals.[195] This could be seen as moral disapproval rather than as animus. How the Court will construe the legislative history of DOMA is uncertain, but the animus rationale would be a viable argument if the Supreme Court extended *Romer* to *Perry*. Assuming that Congress enacted DOMA based on animus, there would be no rational basis for the Court to uphold the law.[196]

Using similar logic, the Court could strike down Prop 8 as unconstitutional using *Romer* but craft a narrow decision only applicable to California. This would allow the Court to find Prop 8 unconstitutional without committing itself to nationwide marriage equality or providing strong precedent to those who seek to attack DOMA.[197] Under California's domestic partnership law, same-sex couples receive essentially all of the same rights and responsibilities that married couples receive.[198] Prop 8 did not infringe those rights, so the only distinction between domestic partnerships and marriage is the word "marriage"; Ninth Circuit Judge N. Rand Smith characterized this distinction as irrational.[199] The Ninth Circuit also seemed to concentrate on the parallels between Prop 8 and the Colorado amendment that *Romer* struck down.[200] *Romer* rebuked withdrawing legal rights that a group had been enjoying,[201] which California did by first issuing marriage licenses to same-sex couples and then denying that issuance.[202] While some states do provide

195. *See, e.g.*, 142 CONG. REC. H7501 (daily ed. July 12, 1996) (statement of Rep. Henry Hyde) ("[M]ost people do not approve of homosexual conduct . . . and they express their disapprobation through [DOMA]."). For a detailed discussion of DOMA and *Romer*, see Andrew Koppelman, *DOMA,* Romer, *and Rationality*, 58 DRAKE L. REV. 923 (2010).

196. This is very similar to the reasoning in *Gill*. *See supra* text accompanying note 102–06.

197. Though this holding may be the most probable, it is given short treatment in this Article since it has little effect on same-sex binational couples.

198. DENNIS CLIFFORD ET AL., A LEGAL GUIDE FOR LESBIAN & GAY COUPLES 33 (15th ed. 2010).

199. Maura Dolan & Jessica Garrison, *Judges Explore Narrow Options in Prop. 8 Appeal*, L.A. TIMES, Dec. 7, 2010, at A1, *available at* http://www.latimes.com/news/local/la-me-1207-prop8-20101207,0,3172063,full.story ("'We're left with a word—"marriage,"' [Judge] Smith said. 'What is the rational basis for that?'").

200. *Id.* ("Reinhardt, the circuit's most liberal judge, noted that Proposition 8 took away a right that gays and lesbians had been enjoying, just as the Colorado initiative repealed anti-discrimination laws that had protected gays.").

201. Romer v. Evans, 517 U.S. 620, 627 (1996) ("The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.").

202. Dolan & Garrison, *supra* note 199, at A1.

domestic partnerships, no other state previously provided marriage rights to same-sex couples and then took them away.[203] Further, Congress may have enacted DOMA for the promotion of morality, but the Act neither took away any previously existing right nor made a distinction only on the word "marriage."[204] Thus, the Supreme Court could strike down Prop 8, as it applies in California, without directly affecting any other states or DOMA by concentrating on the withdrawal of rights and the distinction based on one word—marriage.

The ultimate breadth or narrowness of any Supreme Court ruling is not clear, but same-sex couples must hope for a broad equal protection holding that applies beyond California. If the Court renders such a decision, same-sex couples will have strong precedent to attack DOMA. Without DOMA, marriages of same-sex couples would no longer be barred from federal recognition. Same-sex binational couples who are legally married would then likely receive INA recognition as "spouses," yet they will have to overcome several hurdles along the way.

V. IMMIGRATION ISSUES POST-DOMA

In order for same-sex binational couples to be equal under the INA,[205] DOMA must either be repealed (by the passage of the Respect for Marriage Act) or be judicially overturned (based on *Gill*, *Mass. v. HHS*, or even *Perry*). Yet even if DOMA were no longer law, same-sex couples would be left to navigate the unclear patchwork of state marriage laws. Further, binational couples would be left without a clear definition of what constitutes marriage under the INA. While the current three-step approach to marriage recognition under the INA would still remain following a legislative repeal or judicial invalidation of DOMA, the federal government

203. *Id.*

204. When DOMA was passed, no state performed marriages between individuals of the same sex. *See supra* text accompanying note 69. Also, no federal law gives similar benefits to a marriage under a different name, like a domestic partnership. This, however, would be the case if the UAFA were passed. *See infra* Part VI.

205. The word "equal" is chosen to implicate the difference between this solution and the UAFA discussed in Part VI. The UAFA would provide a possibility of family-based immigration for same-sex couples, but Part VI.C–D discusses the different criteria used for same-sex couples (even spouses) versus opposite-sex couples.

could potentially use its plenary power over immigration to define marriage anew for immigration purposes. Below, this Article explores the possible resolutions to these open issues to provide a clear path to immigration equality for same-sex binational couples in a hypothetical post-DOMA world.

A. Defining Marriage for Immigration

In the absence of DOMA, some definition of the term "marriage" will be required in order to permit gay and lesbian U.S. citizens and LPRs to sponsor their spouses. The federal government could create a definition or the current three-step approach could be interpreted to apply to marriages between individuals of the same sex. The latter is more likely.

1. Creating a New Definition for Marriage Is Unlikely

In theory, Congress could choose to create a federal definition of marriage or spouse for immigration purposes only. This, however, seems improbable because defining marriage in only one area would be completely inconsistent with the current federal deference to state law[206] and may even encroach on federalism principles.[207] If Congress still felt that a definition was necessary, it could create one universal definition of marriage or spouse that would not violate any court ruling regarding DOMA's constitutionality. This would likely require a malleable definition of spouse, such as the one in *Black's Law Dictionary*: "[o]ne's husband or wife by lawful marriage."[208] Such a federal definition would be consistent with the current approach—leaving the states to define what a lawful marriage is. Adding a definition that reflects already current law would be superfluous, making Congress unlikely to do so.

2. Plenary Power Is Not an Obstacle

On the other hand, even in a post-DOMA world, it is theoretically possible that Congress could still choose to create a

206. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 391 n.126 (D. Mass. 2010).

207. If the DOMA were overturned on Tenth Amendment grounds, Congress's act of defining "spouse" in immigration may again exceed its power by entering the realm of family law. *See* discussion of *Mass. v. HHS supra* Part III.B. On the other hand, Congress may invoke its plenary power here.

208. BLACK'S LAW DICTIONARY 1533 (9th ed. 2009).

federal marriage definition for immigration that continues to exclude gays and lesbians from family-based immigration. It is doubtful that Congress would take such an approach if it were to repeal DOMA, but the approach is plausible if DOMA were judicially overturned.[209] Congress may want to strike back at the Court and thus could use its plenary power over immigration to define spouse[210]—for immigration purposes only—to exclude marriages of same-sex couples. While the courts are very deferential to Congress in immigration contexts, a U.S. citizen (one part of a same-sex binational couple) would have strong legal arguments to attack such a use of the plenary power in a post-DOMA world as a violation of equal protection.

The Constitution provides Congress with the power "[t]o establish a uniform Rule of Naturalization,"[211] but it is silent as to admission and expulsion of aliens.[212] Nonetheless, since 1889 the Supreme Court has recognized the so-called plenary power of Congress over immigration.[213] According to the Court, the federal government enjoys an unfettered right to exclude, and that exercise of power merits extraordinary judicial deference.[214] Justification for the power is found in the general grant of federal power over foreign relations and as "an incident of sovereignty."[215] The power applies to both substance and procedure[216] and continues into the twentieth century, even in spite of some immigration laws' discriminatory

209. Congress could pass a law that potentially violates a DOMA ruling. After all, the legislative history of DOMA shows an understanding of a potential conflict with *Romer*. *See supra* note 194.

210. This is different than arguing that there should be judicial deference to DOMA in the immigration context because, as the DOJ has said, "neither DOMA nor its legislative history suggest that DOMA was enacted as an exercise of Congress's plenary power." Chris Geidner, *Defending DOMA, Fighting Back*, METRO WEEKLY (Sept. 6, 2011 2:53 PM), http://metroweekly.com/news/?ak=6543.

211. U.S. CONST. art. I, § 8, cl. 4.

212. ALEINIKOFF ET AL., *supra* note 44, at 192.

213. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

214. *Id.* at 603–04.

215. *Id.* at 609. For further discussion of the plenary power and its justifications, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

216. Motomura, *supra* note 215, at 552.

effects.[217] Invoking this power, Congress could amend the INA to explicitly discriminate against same-sex binational couples. However, new developments in the law suggest a limiting of this plenary power—especially when a U.S. citizen is involved.

Recent precedent demonstrates that the Court is deferring less to Congress in the immigration context.[218] The Court specifically noted that the plenary power over immigration "is subject to important constitutional limitations"[219] and cannot "offend some other constitutional restriction[s]."[220] Under this rationale, the Fifth Amendment's equal protection principles would limit Congress' continued exclusion of same-sex binational couples, if any, in a post-DOMA world.[221]

In two recent equal protection decisions, the Court demonstrated its willingness to apply heightened scrutiny even to immigration laws.[222] The Court, however, stated that it would only decide the equal protection challenge in *Nguyen v. INS*[223] because Nguyen's U.S. citizen father was a party to the suit. Unlike most plaintiffs challenging immigration laws, same-sex binational couples include

217. Fiallo v. Bell, 430 U.S. 787, 799 (1977) (allowing immigration laws to deny an unmarried father immigration preferences because such decisions were "solely for the responsibility of the Congress and wholly outside the power of [the Supreme] Court to control." (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring))).

218. Whitney Chelgren, Developments Article, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1514–16 (2011). Though *Fiallo v. Bell* rejected an equal protection attack on an immigration statute, the Court left the door open for judicial review. 430 U.S. at 792, 793 n.5 ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of the Congress to regulate the admission and exclusion of aliens . . . ."). Lower courts have taken this language, combined with the "facially legitimate and bona fide reason" test from *Kleindienst v. Mandel*, 408 U.S. 753 (1972), to support judicial review in immigration. Following these lower court decisions it appears the plenary power is diminishing. *See* Motomura, *supra* note 215, at 607–13.

219. Zadvydas v. Davis, 533 U.S. 678, 695 (2001). While the case was decided on statutory grounds, the constitutional values may have influenced the decision.

220. Buckley v. Valeo, 424 U.S. 1, 132 (1976).

221. *See supra* note 166.

222. The Court first indicated a willingness to extend heightened scrutiny to an equal protection challenge in *Miller v. Albright*, 523 U.S. 420 (1998). While no opinion received a majority vote, the opinions of five different justices indicated a willingness to extend intermediate scrutiny to equal protection claims in immigration matters. Pinix, *supra* note 4, at 481. Justice O'Connor's concurrence specifically stated that she would only be willing to apply intermediate scrutiny if the citizen father was in the case. *Id.* at 484. Then in *Nguyen v. INS*, 533 U.S. 53, 60–61 (2001), while it ultimately upheld the law, the Court did apply a heightened scrutiny to the gender discrimination claim.

223. 533 U.S. 53, 58 (2011).

one person who is either a U.S. citizen or LPR.[224] Therefore, same-sex binational couples have an even stronger claim for relief than the plaintiffs in *Nguyen* do. There, the citizen was tangentially involved with the noncitizen who suffered the direct injury. A same-sex binational couple like Beddingfield and de Leon could challenge the immigration law based on its direct injury to the citizen, Beddingfield, by preventing him from sponsoring his spouse while allowing other citizens to sponsor their spouses.

Once the couple has standing to appeal, the only open question is what level of review the Court should apply. This would likely depend on any precedent set in a *Gill* or *Perry* appeal that leads to this post-DOMA world. It would seem unlikely that if the Court were to strike down DOMA on equal protection grounds it would not also strike down a use of the plenary power that similarly discriminates against same-sex couples. Thus, the plenary power is not an obstacle to same-sex binational couples seeking immigration benefits. In a post-DOMA world, the important step for same-sex binational couples would be getting their marriages recognized under the INA. The current three-step approach for marriage recognition under the INA should not pose a problem for same-sex binational couples.

3. Applying the INA Three-Step Test Allows for Recognition of Marriage for Same-Sex Couples

Assuming that Congress does not create a universal definition of marriage, how would "marriage" or "spouse" be defined in immigration laws in a post-DOMA world? Immigration law (like other federal laws) generally follows states' (or another nation's) definitions of marriage.[225] The INA does not explicitly provide this in its text, but a valid marriage for purposes of the INA currently follows a three-step approach: (1) validity where celebrated, subject to (2) policy exceptions, and (3) bona fides.[226]

First, the general rule is that "a marriage valid where celebrated is valid everywhere."[227] Courts have long enforced this principle in

224. *See generally* Motomura, *supra* note 9 (discussing so-called citizen proxy arguments).

225. See *infra* notes 229–32 and accompanying text.

226. Titshaw, *supra* note 45, at 550.

227. *Id.* at 559; *see also* 2 GORDON, MAILMAN & YALE-LOEHR, *supra* note 25, § 36.02[2][a], at 36–4 to –8 ("The validity of a marriage ordinarily is judged by the law of the place where it is celebrated.").

regard to conflict of laws and immigration.[228] For family-based immigration, married couples must demonstrate to immigration officials through documentation that they followed the law in the jurisdiction where they celebrated their marriage.[229] This is true whether the jurisdiction is a U.S. state or another country.[230] This deference to states extends to so-called common-law marriage[231] and even to a marriage involving a transsexual[232] person. The Board of Immigration Appeals (BIA) ruled that a transsexual woman[233] is able to sponsor a foreign-born man because North Carolina gives legal effect to sex reassignment and recognizes the marriage as heterosexual; thus, the marriage does not violate DOMA.[234] While it is arguable whether Congress intended to allow such marriages under DOMA, the BIA will determine marital status per individual state law unless it is a so-called same-sex marriage—falling explicitly under the narrow exception in DOMA Section 3, the definitional provision.[235] Following this general rule of deference to state law, in the absence of DOMA the INA should recognize the marriages of same-sex couples that were performed in states or countries where the marriages are valid, like Massachusetts or the Netherlands.

The second part of the test could—but likely does not—pose a problem for binational same-sex couples. There is a public policy

228. *See, e.g.*, Patterson v. Gaines, 47 U.S. 550, 587 (1848) ("Marriage is to be decided by the laws of the place where celebrated." (citing Phillips v. Gregg, 10 Watts 158, 168 (1840))); Luna, 18 I. & N. Dec. 385, 386 (B.I.A. 1983) ("The District Director correctly noted that the validity of a marriage generally is determined according to the law of the place of celebration.").

229. *See, e.g.*, FAM: VISAS 40.1, *supra* note 43, at note N1.1(c) ("The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls (except as noted in paragraph d of this section). If the law is complied with and the marriage is recognized, then the marriage is deemed to be valid for immigration purposes."). Paragraph (d) is discussed *infra* note 238 and accompanying text.

230. *See* ALEINIKOFF ET AL., *supra* note 44, § A, at 327.

231. Titshaw, *supra* note 45, at 562.

232. The word "transsexual" is chosen over the broader term "transgender" because transsexual more narrowly refers to people who choose medical treatment to align their gender identities with their physical bodies. Mary Coombs, *Sexual Dis-orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 238 (1998).

233. This refers to a person born with XY chromosomes that had surgery to reassign her body as a female.

234. Lovo-Lara, 23 I. & N. Dec. 746, 751 (B.I.A. 2005).

235. *Id.* at 751–52 ("If Hawaii or some other State eventually recognizes homosexual 'marriage,' Section 3 will mean simply that that 'marriage' will not be recognized as a 'marriage' for purposes of federal law. *Other than this narrow federal requirement*, the federal government will continue to determine marital status in the same manner it does under current law." (citing H.R. REP. NO. 104-664, at 31 (1996))).

exception to the general rule of validity where celebrated. Strong public policy objections are often grounds for a state to refuse to recognize marriages that were celebrated in another state, but an even stronger policy is necessary in the context of immigration.[236] Per the Attorney General, only express public policy in immigration law can be used to deny admission to aliens.[237] There is no express federal public policy against so-called same-sex marriages. It could be argued that DOMA (if it is still law) is such a public policy, but the U.S. State Department specifically distinguishes between public policy exceptions and DOMA when it explains which marriages should be void.[238] Further, the Obama administration's public policy extends benefits to same-sex couples to the extent possible under DOMA.[239] So, if DOMA were no longer law, there is no public policy basis to refuse to respect the validity of marriages between same-sex couples if they were valid where they were celebrated.

The final step of the analysis to determine whether a marriage is valid under the INA requires the marriage to be bona fide. Marriage fraud could also be labeled a federal public policy exception (rather than the final step in assessing the validity of marriage), but, regardless, it would not prevent INA recognition of marriages between same-sex individuals. The INA, in several instances, expressly lays out marriage bona fides as evidentiary requirements.[240] Immigration officials try to determine whether the couple entered into the marriage solely for the purpose of obtaining immigration benefits. The officials will often look at numerous documents like

236. For a discussion of state public policy exceptions and their affect on the INA, see *infra* Part V.B.

237. Issuance of Immigration Visa, 37 Op. Att'y. Gen. 102, 111 (1933) ("The only public policy of the United States that I am authorized to recognize with respect to the admissibility of aliens is that found in the immigration law.").

238. FAM: VISAS 40.1, *supra* note 43, at note N1.1(d) ("Marriages, considered to be void under State law as contrary to public policy, such as polygamous or incestuous marriages, or which Federal law such as the Defense of Marriage Act determines does not meet the Federal definition of a marriage, cannot be recognized for immigration purposes even if the marriage is legal in the place of marriage celebration.").

239. CNN Wire Staff, *Obama Orders More Benefits for Same-Sex Partners of Federal Workers*, CNN (June 2, 2010), http://articles.cnn.com/2010-06-02/us/obama.gay.benefits_1_same-sex-partners-federal-workers-benefits?_s=PM:US.

240. This is a requirement for permanent residence, INA § 216(d)(1)(A)(i)(III), 8 U.S.C. § 1186a(d)(1)(A)(i)(III) (2006); deportation for marriage fraud, INA § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G); and knowingly entering into a marriage to evade immigration laws, INA § 275(c), 8 U.S.C. § 1325(c).

wedding photos and love letters to find the possibility of a sham marriage.[241] Marriages of same-sex couples should be able to meet the same scrutiny if the marriages were indeed not fraudulent.[242]

4. Precedent Restricting Recognition Is No Longer Valid

The only possible legal obstacle for allowing marriages of same-sex couples under the INA post-DOMA is the precedent of *Adams v. Howerton*, which says that Congress intended the term marriage in the INA to only include opposite-sex couples.[243] Yet, this precedent, while it has not been overturned, is no longer valid. First, the *Adams* decision relied on Congress' express exclusion of gays and lesbians under the INA.[244] As of 1990, there is no longer an express exclusion in the statute, so it cannot be a justification to maintain the *Adams*' precedent. Also, the Ninth Circuit no longer uses test that the *Adams* court applied to the INA.[245] Furthermore, the Ninth Circuit now expressly acknowledges that the INA relies on state law in determining whether a marriage exists,[246] while the *Adams* court looked only to federal law. Even the DOJ has argued that the reasons for the denial of immigration benefits in *Adams* "are no longer valid today."[247]

Without *Adams* posing any significant precedential problem, in a post-DOMA world the INA should recognize same-sex binational couples' valid marriages under the current three-step approach. Assuming that federal recognition of legal marriages between same-sex couples occurs, the only remaining obstacle for same-sex immigration equality is state marriage recognition. Without criminal prohibitions, state public policy will not likely stand in the way of INA recognition of marriages between same-sex individuals.

241. Titshaw, *supra* note 45, at 581, 581 n.195.

242. In fact, the UAFA is specifically written to provide equal fraud standards for permanent partnerships as marriages. *See infra* text accompanying notes 274–75.

243. Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982).

244. *Id.* at 1040.

245. *Adams* used a two-part test, but a three-part test is the current black letter rule. Ageyman v. INS, 296 F.3d 871, 879 n.2 (9th Cir. 2002).

246. Kahn v. INS, 36 F.3d 1412, 1415 (9th Cir. 1994).

247. Geidner, *supra* note 210.

B. State Marriage Recognition Post-DOMA

Before same-sex binational couples are eligible for family-based immigration, they must first be married in a jurisdiction that is willing to perform marriages for same-sex couples. As of publication, there are only seven jurisdictions where same-sex marriage is legal in the United States.[248] The INA's "valid where celebrated" requirement recognizes international marriages, so the options for gays and lesbians also include one of the ten nations that currently allow marriages for same-sex couples.[249] Unless a couple lives in one of these sixteen places, it appears that they cannot enter into a valid marriage. A seemingly easy solution, though, is for them to get married in a neighboring jurisdiction that allows marriage for individuals of the same sex, even if the couple's state of domicile does not.

Besides the inconvenience and expense of travel, same-sex binational couples must be aware that state public policy exceptions may prevent marriage recognition under the INA.[250] Though most states recognize valid marriages from other states,[251] the common law recognizes exceptions when there is a strong public policy objection to a marriage in the couple's state of domicile.[252] Many states have a public policy against so-called same-sex marriage.[253] However, under

248. *See supra* note 77.

249. *Id.*

250. Titshaw, *supra* note 45, at 565.

251. This is in accordance with comity and the Full Faith and Credit Clause of the Constitution. U.S. CONST. art. IV, § 1.

252. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid *unless it violates the strong public policy of another state* which had the most significant relationship to the spouses and the marriage at the time of the marriage." (emphasis added)). Section 2 of DOMA codifies this exception specifically for so-called same-sex marriages. *See supra* note 66. Since *Gill* and *Mass. v. HHS* do not challenge Section 2, it could pose an obstacle for same-sex couples seeking to have their marriages recognized in their states of domicile. However, assuming that Section 3 is struck down, it would seem unlikely that Section 2 could also stand, as it is likely a violation of the Full Faith and Credit Clause. *See* Mark Strasser, *Life After DOMA*, 17 DUKE J. GENDER L. & POL'Y 399, 408–12 (2010). Also, any precedent created in striking down Section 3 could be used to attack Section 2. For example, if Section 3 is struck down because it was passed with animus, Section 2 could similarly be attacked. If no violation of the Full Faith and Credit Clause exists, then states are already free to refuse recognition of marriages between same-sex individuals that were performed in other states, so Section 2 is superfluous.

253. Thirty states have constitutional amendments prohibiting so-called same-sex marriage and thirty-nine have statutes to a similar effect. *Same Sex Marriage*, *supra* note 77. There are also several states without a public policy against marriages of same-sex couples. Besides the seven

the INA the policy must be a *criminal* prohibition before recognition is refused.[254] After *Lawrence*—where a statute criminalizing same-sex sodomy was ruled unconstitutional—it seems unlikely that states could criminalize so-called same-sex marriage.[255] Thus, marriages of same-sex couples will likely be recognized under the INA, even if the couples are not domiciled in one of the seven jurisdictions that perform such marriages.[256]

The only other possible public policy that could impede INA recognition of marriages between same-sex individuals is the prohibition on the evasion of marriage laws. The BIA has previously refused to recognize a marriage that violates the law of a couple's state of domicile—when the state expressly prohibited couples from evading marriage laws by traveling for the purpose of marrying and then returning.[257] Therefore, same-sex couples who are domiciled in a state that expressly prohibits the evasion of its marriage laws may not be able to travel, get married, and, on their return, expect federal recognition of their marriage. Yet, this rule rests on a single BIA case that involved *criminal* prohibition.[258] Same-sex binational couples will need to research local laws in order to know if their state of domicile has a criminal law prohibiting the evasion of its marriage laws. Post-DOMA, it is plausible that state governments may pass

jurisdictions that allow such marriages, several states recognize marriages of same-sex couples performed elsewhere. Maryland, and Rhode Island recognize marriages of same-sex couples performed elsewhere. *Id.* New Mexico and New Jersey neither recognize nor prohibit marriage between individuals of the same-sex. *See id.* However, the Attorney General of New Mexico released an opinion on January 4, 2010, stating that marriages of same-sex couples performed elsewhere can be recognized under New Mexico law. Steve Terrell, *AG: Other States' Same-Sex Marriages Valid in N.M.*, SANTA FE NEW MEXICAN (Jan. 5, 2011), http://www.santafenewmexican.com/Local%20News/AG--Other-states--same-sex-marriages-valid-in-N-M-. Washington approved a measure recognizing out-of-state same-sex marriages as domestic partnerships. Associated Press, *WA Legislature OKs Out-of-State Same-sex Unions*, SEATTLE TIMES (Mar. 30, 2011 1:56 PM), http://seattletimes.nwsource.com/html/localnews/2014641392_apwaxgrdomesticpartnerships1stldwritethru.html.

254. Titshaw, *supra* note 45, at 569 ("Generally, so long as the couple's relationship would not violate the strong public policy expressed in the *criminal* law of its state of domicile, the marriage is valid for U.S. immigration purposes." (emphasis added)). This principle has been applied to states with antimiscegenation, consanguinity, and age-of-consent laws. *Id.* at 565–75.

255. *See supra* text accompanying note 76.

256. This does not mean that the state would have to recognize the marriage under its laws. *See* Strasser, *supra* note 252, at 418.

257. Zappia, 12 I. & N. Dec. 439, 442 (B.I.A. 1967) (denying recognition of a legal marriage performed in South Carolina between first cousins because they violated Wisconsin's statutory provisions criminalizing first-cousin marriages and the evasion of its marriage laws).

258. *Id.*

such laws to make sure that their public policy against so-called same-sex marriage is not circumvented. This may require some couples to move in order to receive immigration rights.

Assuming that there is no criminal prohibition of marriage between individuals of the same-sex or of the evasion of marriage laws, states will not have a strong enough public policy exception to change the "valid where celebrated" rule for purposes of the INA. Thus, legally married same-sex binational couples would likely be eligible for spousal sponsorship under the INA regardless of where they are domiciled. Of course, all of this is only possible in a post-DOMA world. If DOMA remains law, same-sex binational couples will continue to be denied family-unification unless some legislative action is taken.

VI. UAFA AND ITS IMPLICATIONS FOR IMMIGRATION

If DOMA is not repealed or overturned, same-sex binational couples must look elsewhere to achieve immigration equality. One solution is the Uniting American Families Act (UAFA), which adds a new category of "permanent partner" to family-based immigration.[259] The UAFA has been introduced in Congress as a stand-alone bill, but it is also being discussed as a necessary piece of any comprehensive immigration reform.[260] Even if the UAFA is passed in some form, same-sex binational couples will not be treated as equal to opposite-sex couples under the current language of the bill. This part explores UAFA's drafting pitfalls and possible resolutions.

A. History of the Bill

In February 2000, Representative Jerrold Nadler of New York first introduced the Permanent Partners Immigration Act in the House of Representatives.[261] Three years later, Senator Patrick Leahy

259. Dennis A. Golden, *The Policy Considerations Surrounding the United States Immigration Law as Applied to Bi-national Same-sex Couples: Making the Case for the Uniting American Families Act*, 18 KAN. J.L. & PUB. POL'Y 301, 319 (2009).

260. Rep. Mike Honda, *Immigration Reform Makes Cents*, POLITICO (Feb. 3, 2011 4:40 AM), http://www.politico.com/news/stories/0211/48697.html.

261. Permanent Partners Immigration Act of 2000, H.R. 3650, 106th Cong. (2000), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR03650:.

of Vermont introduced a sister bill in the Senate.[262] In 2005, both bills were renamed as the Uniting American Families Act.[263] The UAFA's purpose is to amend the INA to allow U.S. citizens and LPRs to sponsor their permanent partners.[264] In other words, it purports to provide same-sex binational couples with the same spousal sponsorship rights that opposite-sex married couples receive without requiring the same-sex couples to be married. Providing these rights, however, will require passage of the bill, which is far from likely in the 112th Congress.[265]

While the UAFA may not pass as a stand-alone bill, it is also included in more comprehensive reforms of family-based immigration. Representative Mike Honda of California introduced the Reuniting Families Act on August 19, 2009.[266] The bill is meant to generally promote family unity in immigration by alleviating the long wait times for families of LPRs (by making them exempt from quotas) and decreasing other measures that prevent family members from obtaining visas.[267] Further, by incorporating the UAFA, the bill "eliminates discrimination in immigration law" against same-sex couples.[268] As part of comprehensive immigration reform, the bill has a broader coalition of immigrant and civil rights groups supporting it than the UAFA alone has.[269] The largest problem for same-sex binational couples is that the Reuniting Families Act's sister bill in

262. Permanent Partners Immigration Act of 2003, S. 1510, 108th Cong. (2003), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:S01510:.

263. Golden, *supra* note 259, at 319.

264. *Id.*

265. All cosponsors of the UAFA proposed in 2009 were Democrats. *See H.R. 1024 Cosponsors*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01024:@@@P (last visited Nov. 5, 2010); *S. 424 Cosponsors*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00424:@@@P (last visited Nov. 5, 2010). The House of the 112th Congress is controlled by a Republican majority, making it unlikely that a bill sponsored only by Democrats will pass. Alan Silverleib, *supra* note 91. The Senate in 2009 held its first hearing on the UAFA, but only four senators attended, which demonstrates the weak support for passage. Matt Graham, *UAFA Senate Hearing*, CTR. FOR IMMIGRATION STUDIES (June 4, 2009), http://www.cis.org/Graham/UAFAHearing.

266. Reuniting Families Act of 2009, H.R. 2709, 111th Cong. (2009), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.2709:.

267. *Reuniting Families Act*, *supra* note 38.

268. *Id.*

269. Kerry Eleveld, *Reuniting Families Act Introduced*, ADVOCATE (June 4, 2009), http://www.advocate.com/article.aspx?id=78468. Rep. Honda also thinks that the bill can appeal to his Republican colleagues because of the fiscal impact of broader reform. Honda, *supra* note 260.

the Senate does not include the UAFA language.[270] So, same-sex binational couples may be left out of comprehensive immigration reform.

While the political prospects of the UAFA and the Reuniting Families Act remain uncertain, as long as DOMA remains law, these bills provide the only hope for same-sex families wishing to remain together in the United States. The rest of this part analyzes the bill's goals for equal family unification (assuming it is passed in its current version) and the requirements that make it fall short of those aims.

B. Text of the UAFA

If the UAFA (or the House version of the Reuniting Families Act) becomes law, it would allow gay and lesbian U.S. citizens and LPRs to sponsor their "permanent partner[s]" for green cards, in the same manner that opposite-sex spouses do. The bill amends the INA and defines a permanent partner as:

> [A]n individual 18 years of age or older who—
>
> (A) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment;
>
> (B) is financially interdependent with that other individual;
>
> (C) is not married to or in a permanent partnership with anyone other than that other individual;
>
> (D) is unable to contract with that other individual a marriage cognizable under this Act; and
>
> (E) is not a first, second, or third degree blood relation of that other individual.[271]

Once all of these requirements are met, a gay or lesbian's permanent partner will be treated like a "spouse" under the INA.[272]

Despite concerns,[273] the UAFA would not be any more susceptible to fraud than current spousal sponsorship is. A same-sex couple will have to prove a bona fide relationship through documents

270. Reuniting Families Act, S. 1085, 111th Cong. (2009), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:S.1085:.

271. Uniting American Families Act of 2009, H.R. 1024, 111th Cong. § 2 (2009).

272. The bill adds the words "permanent partner" after the term "spouse" throughout the INA. *Id.*

273. Opponents of the UAFA contend that the bill will open the door to immigration fraud. Graham, *supra* note 265.

with the same burden of proof that opposite-sex married couples have.[274] The U.S. citizen or LPR who is sponsoring his or her partner will have to commit to financial support—just like opposite-sex couples have to do.[275] Even the same criminal penalties apply for immigration fraud and abuse.[276] On its face, the law purports to provide gays and lesbians with an equal opportunity to sponsor their loved ones for family-based immigration. However, there are obstacles within the bill for same-sex binational couples—namely, meeting the bill's requirements and their interaction with DOMA.

C. Marriage Cognizable Under the Act: Interpreting for Consistency

The UAFA tries to avoid a conflict with DOMA by limiting its application to couples "unable to contract . . . a marriage cognizable under [the INA]."[277] Same-sex couples are the intended beneficiaries of this new category since their marriages are currently not cognizable under the INA—because of DOMA. When the UAFA was originally proposed in 2000, no state performed marriage between same-sex individuals. Now there are seven jurisdictions doing so, and there are also several court challenges to DOMA. Both of these new developments create asymmetrical rights and make the "unable to contract . . . a marriage cognizable under [the INA]" requirement complex to apply.

1. Asymmetrical Rights Are Created

If a couple like de Leon and Beddingfield is legally married in Washington, D.C., can the spouses still apply for permanent partner sponsorship? They are married, but because of DOMA their marriage is not cognizable under federal law. It seems that they fit the UAFA's criteria. This interpretation would allow the bill to apply in today's world to married same-sex couples, but it would create inequality for opposite-sex couples. Permanent partnerships only apply to couples that cannot get married under federal law. Opposite-sex couples are able to get married and are thus unable to form

274. Ayoub & Wong, *supra* note 50, at 573.
275. *Id.*
276. *Id.*
277. *See supra* text accompanying note 271.

permanent partnerships under the INA. In jurisdictions that recognize marriages between same-sex individuals, members of same-sex binational couples, whether they are married or not, would be able to sponsor their partners or spouses, but opposite-sex couples would only be given the same benefit if they choose to marry. This would treat couples differently based on gender and could be a Fifth Amendment equal protection issue.[278]

Another asymmetrical rights structure would exist if DOMA were only partially struck down. For example, DOMA could be struck down only in the First Circuit for a period of time,[279] while the Congress could pass the UAFA to benefit people in other circuits. Under this scenario, marriages of same-sex couples in Massachusetts and New Hampshire would be recognized in their state and under federal law, so those couples could not apply for permanent partnerships. However, marriages of same-sex couples in Vermont and Washington, D.C., would not be recognized federally, so those couples could apply for permanent partnerships. This would create an incoherent patchwork where members of same-sex binational couples in Vermont, whether they are married or not, could sponsor their partners or spouses, but similar couples in Massachusetts would only be given the same benefit if they choose to marry. The federal government would then be treating couples differently based on where they live—another potential equal protection issue.[280]

If DOMA were repealed or struck down nationwide, an asymmetrical rights issue would not exist, but the UAFA would be superfluous.[281] This means that Congress would not likely pass the UAFA in a post-DOMA world. It is possible, however, that the UAFA could pass and that DOMA could then be repealed or overturned sometime later.[282] This would implicate the interpretation

278. However, the government could argue that there is an important interest for the gender disparity—remedying past discrimination. *See* Califano v. Webster, 430 U.S. 313 (1977) (finding that reduction in past disparity because of gender is an important governmental objective). The ultimate outcome of such a case is beyond the scope of this Article.

279. This assumes that the First Circuit affirms *Gill* or *Mass. v. HHS* and the Supreme Court denies certiorari.

280. Since no suspect classification or fundamental right is at stake, the Court would likely only apply rational basis review. *See* CHEMERINSKY, *supra* note 74, at 719–23.

281. In a post-DOMA world, same-sex married couples would likely have equal family-based immigration rights. *See* discussion *supra* Part IV.

282. If the UAFA were law and DOMA was repealed later, there would be administrative issues to consider. Some same-sex binational couples may have already applied for permanent

problem—what does it mean to be unable to contract a cognizable marriage?

2. When Is a Couple Unable to Contract Marriage?

If DOMA is repealed after the UAFA is in place, marriages between same-sex individuals would become cognizable under the INA. Couples that can marry are not able to be permanent partners. Does this mean that same-sex couples in states that prohibit so-called same-sex marriage, like Texas,[283] are "unable to contract . . . a marriage cognizable under [the INA]"? Without DOMA, same-sex couples in states like Texas *may* still be able to get married in Massachusetts and then have their marriage recognized under the INA.[284] On the other hand, if the state criminally prohibits the evasion of its marriage laws, the couple may not be able to contract a marriage.

The law would be unclear on what obstacles make the couple unable to contract a marriage. Would it be sufficient that the couple has to travel out of state or would they need to be subject to some criminal prohibition? Some guidance from Congress or an interpretation of the UAFA by the BIA would be necessary. A narrow interpretation of the UAFA could lead to different treatment federally depending on where one lives, but deference to state law may be a rational basis for such distinction. Assuming the broadest interpretation, Texas couples would likely be considered unable to contract a marriage. Then same-sex binational couples in Texas (and in other states where so-called same-sex marriage is not allowed) could apply for family-based immigration as permanent partners.

3. Remove the Requirement in Order to Broaden the Bill

To avoid these interpretation problems and possible asymmetrical rights issues, the best fix is to eliminate the UAFA's

partnership, but now they could in theory apply for a green card as a spouse. Since there are different requirements for permanent partners and spouses, some administrative measure would be necessary to change the application. One solution could be some form of "upgrade" to the sponsorship petitions. *See Glossary of Visa Terms: Upgrade a Petition*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/frvi/glossary/glossary_1363.html#upgradepetition (last visited Apr. 9, 2011).

283. *See Same Sex Marriage*, *supra* note 77.

284. This of course depends on the state's public policy and potential criminal prohibitions in regard to marriage. *See* discussion *supra* Part V.B.

restrictive language altogether. This would take care of the problem of interpreting who is "unable to contract" in today's world, where marriages between same-sex individuals are performed, and what is "cognizable" in a post-DOMA world.

Yet the benefits go beyond that. Striking out the language would mean that even opposite-sex couples could apply for permanent partnerships. This serves two purposes. First, this may increase support behind the UAFA by making it no longer about same-sex couples but more generally about family unification. Second, this would recognize the changing family structure in the United States. For example, as of the 2000 census, unmarried cohabitating partners formed nearly four million households.[285] Expanding permanent partnerships to some of these couples (that may be binational) would also bring U.S. family unification policy closer to those of our international allies.[286] In all, eliminating the unable-to-contract-a-marriage requirement would provide a more consistent application of the rights granted by the bill—whether or not DOMA is law.

D. Financial Interdependence: Problems and Solutions

Separate from the unable-to-contract-a-marriage requirement discussed above, the UAFA's financial-interdependence requirement for a permanent partnership is particularly problematic for same-sex binational couples. The requirement that a permanent partner be "financially interdependent with that other individual"[287] seems to be modeled after state domestic partnership laws. But binational

285. There are 3.8 million, but that number is likely undercounted. JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: MARCH 2000, at 12 (2001), *available at* http://www.census.gov/prod/2001pubs/p20-537.pdf. For a further discussion on responding to the growth of nonmarital cohabitation see Thomas P. Gallanis, *The Flexible Family in Three Dimensions*, 28 LAW & INEQ. 291 (2010).

286. *See generally* Bonnie Miluso, Note, *Family "De-unification" in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners*, 36 GEO. WASH. INT'L L. REV. 915 (2004) (providing examples of nations that have incorporated same-gender partner immigration rights into their legal structures). For example, Canada provides three avenues for a citizen to sponsor a partner (whether same-sex or opposite-sex): as a spouse, as a common-law partner, or as a conjugal partner. CITIZENSHIP & IMMIGRATION CAN., IMMIGRATION CANADA: SPONSORSHIP OF A SPOUSE, COMMON-LAW PARTNER, CONJUGAL PARTNER OR DEPENDENT CHILD LIVING OUTSIDE CANADA 3 (2010), *available at* http://www.cic.gc.ca/english/pdf/kits/guides/3999E.pdf. The United Kingdom does not recognize marriages of same-sex couples, but it has allowed immigration for same-sex couples through the "Unmarried Partners Rule." Miluso, *supra*, at 931.

287. *See supra* text accompanying note 271.

relationships—often requiring the partners to live oceans apart— are inherently different from domestic relationships, where both persons are U.S. citizens. Also, no such financial-interdependence requirement is imposed on opposite-sex couples, so it is not clear what the requirement entails and how binational couples are able to satisfy it. Removing this requirement or expanding fiancé visas are possible solutions to assure that the UAFA's goals are achievable for all same-sex binational couples.

1. Defining Financial Interdependence

The UAFA never defines what it means to be financially interdependent with the other individual,[288] and the requirement is neither mentioned nor defined in the INA itself.[289] If the plain meaning rule were followed,[290] financial interdependence would be interpreted to roughly mean reliance between two people for financial support.[291] This reliance could be proved "by submitting evidence of a joint bank account, and shared responsibility (e.g. both names on statements) for credit cards, utilities, rent, and the like."[292] Many domestic laws and policies support this explanation. Some states have similar financial interdependence language within their domestic partnership laws,[293] and businesses often require a comparable showing of financial interdependence for a gay or lesbian employee's same-sex partner to receive company benefits.[294] Thus, the remainder of this part assumes that the UAFA drafters

288. *See* H.R. 1024, 111th Cong. (2009).

289. A Westlaw search of 8 U.S.C. for "finan! interdep!" and "financially interdependent" obtained zero results. President Obama even acknowledges that the language is vague and needs to be more specific. Timothy R. Carraher, Note, *Some Suggestions for the UAFA: A Bill for Same-Sex Binational Couples*, 4 NW. J. L. & SOC. POL'Y 150, 164 (2009).

290. The plain meaning rule states that courts should interpret statutory language, if possible, under its plain meaning. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.").

291. This definition was formed by combining the definitions of "inter" and "dependence." *See* MERRIAM WEBSTER DICTIONARY 334 (11th ed. 2008).

292. *Uniting American Families Act*, NAT'L CENTER FOR LESBIAN RTS., n.2 http://www.nclrights.org/site/PageServer?pagename=issue_federallegislation_uafa#footnote2 (last visited Oct. 1, 2010).

293. *See, e.g.*, R.I. GEN. LAWS § 36-12-1(3) (2010).

294. Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 181 (1995).

intend to require a showing of financial support through factors like bank accounts and rent.

2. Achieving Interdependence Is Inherently Difficult for Binational Couples

The problem with such a definition of the financial-interdependence requirement is that what may work for domestic law will not necessarily achieve similar results when it is applied on an international level. Given the current state of the law, many members of binational couples—like Sandra and her Hungarian partner—are forced to live apart.[295] When they are not living together, it is difficult (if not impossible) for them to have shared responsibilities for rent and utilities. The option may exist for them to open an international bank account, but it is not clear if that would be sufficient to show that they rely on each other for support. If members of same-sex binational couples are unable to obtain financial interdependence, they cannot be united under the UAFA, as the requirement is a prerequisite to a permanent partnership.

It seems that the UAFA drafters may have thought they fixed this by extending "conditional permanent resident status" to permanent partners.[296] However, this provision falls short. It is really about proving the bona fides of a marriage (or permanent partnership).[297] It will not assist members of same-sex binational couples in achieving financial interdependence because conditional status is granted only *after* a permanent partnership is formed. It seems unlikely that members of binational couples (who are likely living apart) who have been together less than two years would already be financially interdependent, so obtaining a permanent partnership would be difficult (if not impossible).

If the couple is together in the United States, problems with financial interdependence still arise. The problem is so-called immigrant intent. All non-immigrant visas require the alien to not

295. *See supra* text accompanying note 14.

296. Under the INA currently, if an alien has been married to an opposite-sex spouse for less than two years, he or she is given a green card on a conditional basis. INA § 216, 8 U.S.C. § 1186a (2006). At the end of the two years, if the couple is still married, the alien is granted lawful permanent residence after another immigration interview. *Id.* This same conditional status under the UAFA is given to permanent partnerships under two years. H.R. 1024, 111th Cong. § 12 (2009).

297. *See infra* text accompanying notes 305–06.

intend to stay in the United States permanently,[298] and the burden is on the alien to prove this.[299] Opening a bank account with a U.S. citizen could be evidence of the alien's intent to stay and thus could violate his or her current visa. It would be problematic (and even ironic) for a same-sex couple to try to meet the UAFA's requirement and at the same time violate the INA. There is a potential solution of so-called dual intent,[300] but that is only expressly recognized for certain nonimmigrant categories like temporary workers.[301] Another process—adjustment of status[302]—could also be helpful, but that process is discretionary[303] so preconceived intent may be enough to deny adjustment. In all, members of same-sex binational couples, whether they live apart or together, are going to have many difficulties proving so-called financial interdependence and, therefore, achieving a permanent partnership under the UAFA.

3. Added Requirement Creates Asymmetrical Rights

Besides being difficult to achieve, the financial-interdependence requirement, like the unable-to-contract-a-marriage requirement, creates an asymmetrical rights structure between same-sex and opposite-sex couples. Here, the same-sex couples are the ones who must meet an additional requirement before they receive immigration benefits. Opposite-sex spouses are not required to show that they are financially interdependent with each other in order to qualify for

298. ALEINIKOFF ET AL., *supra* note 44, at 400.

299. *Id.*; INA § 214(b), 8 U.S.C. § 1184(b).

300. If the alien has the *intent* from the beginning to remain permanently in the United States, he or she is not a bona fide nonimmigrant and likely violating his or her visa. ALEINIKOFF ET AL., *supra* note 44, at 400. On the other hand, the BIA has found that a person's *desire* to remain in the United States, should an opportunity present itself legally, is not necessarily inconsistent with nonimmigrant status. Chryssikos v. Comm'r of Immigration, 3 F.2d 372, 375 (2d Cir. 1924); Hosseinpour, 15 I. & N. Dec. 191, 192 (B.I.A. 1975).

301. *See* ALEINIKOFF ET AL., *supra* note 44, at 400. Dual intent is essentially recognized by the 1990 Immigration Act for most temporary workers (H, L, O and P visa categories). 2 GORDON, MAILMAN & YALE-LOEHR, *supra* note 25, § 12.03[1][c], at 12–19 to –20, § 20.06[3], at 20–21 to –23, § 20.13[8], at 20–153 to –154, § 25.01[3], at 25–6 to –8.

302. Under the INA, nonimmigrants who meet certain criteria are able to adjust their status to an LPR without having to travel overseas to obtain the green card from a consular office. INA § 245(a), 8 U.S.C. § 1255(a); ALEINIKOFF ET AL., *supra* note 44, at 656–57. Adjustment of status can also provide relief from removal proceedings. INA § 240A(b), 8 U.S.C. § 1229b(b). The UAFA expressly adds "permanent partnership" after "marriage" and "spouse" in these provisions of the INA. H.R. 1024, 111th Cong. § 16–17 (2009).

303. INA § 245(a), 8 U.S.C. § 1255(a).

sponsorship.[304] On the other hand, commingling of finances is often a primary way of proving the bona fides of a marriage.[305] The commingling presumably happens after the marriage, and courts use it to look at the couple's intent at time of marrying.[306] In other words, same-sex couples would be required to show commingling of finances in order to obtain family-based immigration, but opposite-sex couples would only need to demonstrate the same if the validity of the marriage were in question. To remove this inequality some fix is necessary.

4. Solution: Extending Fiancé Visas

Opposite-sex couples have the option of obtaining fiancé visas. This could be the solution to provide equality between spouses and permanent partners and also give same-sex couples time to achieve financial interdependence. Though the INA only extends green cards to spouses (permanent or conditional), it does allow a fiancé of a U.S. citizen to enter the United States on a K-1 visa, as a nonimmigrant, in order to enter into a marriage.[307]

The UAFA would not add permanent partnerships to K-1 visas, but only to K-2 visas.[308] Therefore, under the UAFA, a gay or lesbian alien can enter the United States *after* his or her permanent partnership has been created with a U.S. citizen—meaning after financial interdependence is proved. If the UAFA were to add permanent partners to the K-1 visa, members of gay and lesbian couples who are living apart could come together in the United States for ninety days. In those ninety days, the couple would then be able to take the necessary steps to prove financial interdependence.[309]

304. *See Immigrant Visas for Spouses of a U.S. Citizen (IR1 or CR1)*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/immigrants/types/types_2991.html (last visited Nov. 1, 2010).

305. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1685 (2007).

306. *Id.*

307. *See supra* notes 48–49 and accompanying text.

308. H.R. 1024, 111th Cong. § 2 (2009) ("Section 101(a) (8 U.S.C. § 1101(a)) is amended—(1) in paragraph (15)(K)(ii), by inserting 'or permanent partnership' after 'marriage' . . . ."). The K-2 visa only allows a spouse (or permanent partner under the UAFA) to enter the United States after the marriage is performed, while awaiting approval of the petition for sponsorship. INA § 101(a)(15)(K)(ii), 8 U.S.C. § 1101(a)(15)(K)(ii).

309. They could open bank accounts, sign joint lease agreements, add the alien to utility bills, etc.

The likely opposition to this proposal is a claim of fraud, but there is no evidence that same-sex couples would be more fraudulent than opposite-sex couples are. In fact, if this change were to be made in the UAFA, then same-sex couples would be subject to the same deportation proceedings that opposite-sex couples face if they do not take the necessary steps within the ninety-day period.[310] Without the addition of a K-1 visa for members of same-sex binational couples living apart, it is unclear how they could ever prove financial interdependence, and therefore achieve a permanent partnership.

5. Solution: Remove the Requirement

A more direct solution to the problems of satisfying the financial-interdependence requirement and the asymmetrical system that it encourages would be to remove the requirement altogether. Many may object, but the language is superfluous to achieving the bill's goals. One concern with the current INA sponsorship scheme is preventing the admission of aliens who are likely to become a "public charge."[311] The UAFA already addresses this concern (mirroring all other family sponsorship avenues) by requiring the sponsoring partner to complete an affidavit of support.[312] The other goal of the financial-interdependence requirement could be that it constitutes proof of a committed relationship, the same way that it is used in domestic laws.[313] A marriage license acts as proof for opposite-sex couples, so this requirement may be the proof for same-sex couples. Of course, there are multiple jurisdictions that now give marriage licenses to same-sex couples, so that reasoning cannot work in those places.[314] Regardless, the UAFA, even without this requirement, already requires a committed relationship explicitly, or it could easily be modified in other ways to do so. Per the UAFA, only conditional residence is granted for a partnership of less than

310. The UAFA would need to add permanent partners to INA § 214(d)(1), 8 U.S.C. § 1184(d)(1) ("In the event the marriage . . . does not occur within three months after the admission . . . , [the alien] shall be required to depart from the United States and upon failure to do so shall be removed . . . .").

311. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

312. 8 U.S.C. §§ 1182(a)(4)(C)(ii), 1183a(f)(1).

313. *See supra* notes 293–94.

314. The requirement may have been applicable when the UAFA was proposed in 2000, but now it seems to be a remnant of the past.

two years.[315] If the partnership has lasted more than two years, instead of looking only at financial interdependence, immigration officials could look to the same bona fides that they consider for opposite-sex marriages.[316] The goals of the financial interdependence prerequisite therefore are already met, or could be met, without adding a substantial obstacle for same-sex binational couples to overcome.

The approach for determining the existence of a permanent partnership under the UAFA should be an overall assessment of the relationship, with financial interdependence being one factor but not a requirement. If it remains a requirement, many of the people who the UAFA is trying to help may be ineligible for family-based sponsorship. In other words, the UAFA—in its current form—might not be as equal as it purports to be.

VII. CONCLUSION

As Representative Jerrold Nadler said, "We . . . strengthen our communities—and our nation—by encouraging loving couples and families to stay together . . . ."[317] However, more than thirty-six thousand families—like Tan's and de Leon's—are unable to remain together legally in the United States simply because they are gay or lesbian. This is because of DOMA. A solution is necessary to prevent these families from choosing among separation, exile, or breaking the law.

The UAFA extends family-based immigration to gays and lesbians, while avoiding the DOMA marriage restriction. But its requirements are unequal and difficult (if not impossible, given the current law) for binational couples to achieve. Equality in name and function is only possible with the end of DOMA. A legislative repeal is not immediately likely, so same-sex couples must turn to the federal courts for relief. *Gill* and *Mass. v. HHS* lay the groundwork for same-sex binational couples to challenge DOMA's application to

315. *See supra* note 296.

316. *See supra* text accompanying note 241. Another option to prove commitment could be to look at cohabitation, but, then again, that is a problem for couples who are forced to live apart because of the current law.

317. Press Release, Representative Jerrold Nadler, Rep. Nadler Continues the Fight for LGBT Immigrant Rights (Feb. 12, 2009), http://www.house.gov/apps/list/press/ny08_nadler/UAFA_021209.html.

immigration. With the DOJ's new stance on the unconstitutionality of DOMA, a successful challenge is more likely than ever before. The *Perry* litigation also provides many legal avenues for same-sex couples to build a successful DOMA challenge, especially if marriage is declared a fundamental right for all couples regardless of their gender (or sexual orientation). If DOMA were no longer law, same-sex binational couples would be steps away from immigration equality. There may be obstacles, but this Article illuminates a path to immigration equality in a post-DOMA world.

While it is uncertain when DOMA will end or if comprehensive immigration reform will include same-sex binational families, it is clear that families and family law in the United States are changing rapidly. As President Obama acknowledged, it is "clear where the trendlines are going."[318] If the United States adheres to its policy of making family unification a cornerstone of immigration, soon the "arc of history"[319] may include same-sex binational families.

318. Sudbay, *supra* note 82.

319. *Id.*